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# Public Government for Private People



The Report of the Commission  
on Freedom of Information  
and Individual Privacy/1980

VOLUME 2  
Freedom of Information



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"...to be well-governed is to be well-informed."

- D.F. Wall, The Provision of Government Information

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## CHAPTER 1

# Introduction

### A. TERMS OF REFERENCE

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March 1977, to

study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;
2. The individual's right of access and appeal in relation to the use of government information;
3. The categories of government information which should be treated as confidential in order to protect the public interest;
4. The effectiveness of present procedures for the dissemination of government information to the public;
5. The protection of individual privacy and the right of recourse in regard to the use of government records.

Our mandate embraces two areas -- freedom of information and the protection of individual privacy -- which appear to be on the public agenda of most, if not all, of the democratic countries of the western world. The freedom of information issue, simply stated, is to what extent should the citizen be entitled, as of right, to obtain access to information held by the government. The privacy protection issue is complementary. It involves the maintenance, use and dissemination of information relating to individuals.

It is obvious that both these issues raise fundamental concerns about the relationship between the citizen and the state. Those who argue for greater access to government information are faced with a competing claim from those who wish to ensure that the invasion of individual privacy does not result from the disclosure of information held in government files. This tension between the freedom of information and privacy protection claims led the government to ask this Commission to study the two questions together. We believe that we are the first group of this kind to undertake this dual assignment.

Over a period of one year, the Commission held public hearings in ten communities in Ontario. In response to public demand, three separate sets of public hearings were held in Toronto. This process of public consultation and its results are briefly described in Chapter 2 of this report. As well, the Commission mounted a substantial research program to prepare the ground for making recommendations on the various items on our agenda. A brief description of the manner in which the research program was organized and of our research publications appears in Chapter 3.

As a first step in our deliberations, we attempted to develop a definition of the term "government" as used in the terms of reference. The rich mixture of governmental, quasi-governmental and publicly-funded organizations in Ontario make it difficult to arrive at a technical or "legal" definition. Should our inquiry extend to all agencies, boards and commissions established by the Ontario government? Should it extend to all institutions, such as hospitals and universities, which receive some measure of public funding? Should it extend to all organizations, whether charitable groups or business concerns, which receive some grant or loan from government sources? In order to make our task manageable, we determined to take a rather traditional view of the notion of "government." Thus, we have focused our concerns on the activities of those institutions which the average citizen is most likely to think of as part of government. We have carefully studied the activities of governmental departments and other government-established institutions, agencies, boards, commissions, and Crown corporations. These are generally perceived by the public to be a part of the machinery of modern government. We have also examined and made recommendations concerning information practices of local government institutions. While it is not our view that the concerns examined in this report have no relevance to the activities of what we choose to see as "non-governmental" organizations, we felt that it would prove sufficiently difficult to analyze adequately the range of freedom of information and privacy protection problems relating to central governmental institutions, and for that reason we have limited our inquiry to those areas outlined above.

Having identified the institutional focus of our inquiry, we found it necessary to determine with some precision which activities formed the proper subject for inquiry. In particular, what were the "public information practices of other jurisdictions" to be examined in accord with paragraph 1 of our terms of reference? Were we to launch a grand inquiry into such matters as government publication or communications strategy in foreign countries? Should our study compare, for example, the operations of the U.S. Government Printing Office with those of the Queen's Printer in Ontario? Should we compare the communications and public relations programs of a typical Ontario government department with similar departments in the United Kingdom? Our own view was that such investigations would lead us too far astray from the heart of our inquiry -- a consideration of the current status of the public right to know in Ontario and suggestions for possible reform. Our proper concern, we felt, was not to examine the whole range of mechanisms which might be used by government to communicate information to the public, but rather to consider the means of citizen access to information which the government may prefer not to disclose. Thus, our investigation of the "public information practices" of other jurisdictions was involved with freedom of information laws or proposals. Our examination of "the effectiveness of present procedures for the dissemination of government information to the public" in Ontario (paragraph 4 in our terms of reference) focused on the freedom of information concern. We have not engaged in an elaborate study of government "communications" policy with a view to recommending changes in the operations, say, of the Queen's Printer or the Citizens' Inquiry Bureau. Such matters have been the subject of considerable study in recent years. For our purposes, it was pertinent to examine such information dissemination practices only insofar as they shed light on the ability of citizens to gain access to government information of interest to them. We looked at the "effectiveness" of current dissemination practices as a response to the freedom of information issue. We did not attempt to determine whether the government uses its communications resources wisely or effectively.

Paragraph 2 of the terms of reference directs us to examine "the individual's right of access and appeal in relation to the use of government information." The essence of the concept of "access" in the context of freedom of information involves the granting of a right to see and make copies of government documents of interest to the inquirer. Modern information technology has resulted in a rather broad definition of "document." For example, information may be stored in computer tapes, photographs, films, videotapes or microfiches, as well as in conventional files. For our purposes, we used the terms "access," "document" and "information" in these senses.

Our terms of reference directed us to recommend possible changes in information policy "which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals." Although we interpret broadly the nature of the parliamentary traditions relevant to our subject, it became evident that a principal concern in the public debate on government information policy relates to the constitutional conventions of individual and collective ministerial responsibility. The responsibility of individual ministers to the Legislative Assembly and the collective responsibility assumed by the Cabinet for government policy are fundamental features of our system of government. These doctrines and their relevance to the rights of individuals seeking access to government information are examined in Chapter 5.

Many citizens may be unfamiliar with the extent and nature of the legal "mechanisms that presently exist for the protection of the rights of individuals." In subsequent chapters we will outline in greater detail the nature of these safeguards and their relationship to the freedom of information issue.

Finally, it was necessary for the Commission to reach a consensus as to the nature of the privacy protection issue to be examined. In recent years, a number of concerns relating to the place of the individual in complex modern societies have coalesced and surfaced as "the privacy issue." The terms of reference directed us specifically to what has become known as the "informational privacy" issue -- the potential invasions of privacy inherent in the increasingly extensive personal information-gathering practices of large governmental institutions.

Thus, there are a number of privacy-related issues which do not properly concern this Commission and which receive no consideration in this report. Because our focus was restricted to the activities of governmental institutions, we did not attempt to examine informational privacy issues arising from the activities of business organizations. We made no attempt to assess the privacy problems associated with activities such as credit reporting, banking, and the selling of insurance. Further, our concern with informational privacy led us away from a concern about electronic surveillance as a privacy protection issue. The use of electronic surveillance for law enforcement purposes has, of course, been the subject of much study (and ultimately, legislation) in Canada. We felt that it would be pointless to duplicate these efforts. One further limitation was self-imposed. Shortly after the establishment of this Commission, another commission of inquiry was appointed to examine the privacy and confidentiality problems associated with health records. Although the subject of health

records was prominent in our early planning of the research program, the appointment of the Royal Commission of Inquiry into the Confidentiality of Health Records, under the chairmanship of Mr. Justice Horace Krever, led us to substantially reduce our commitment of resources in this area. Although, as will be seen, we do make particular reference to the problems posed by health records for our proposals, we have attempted to avoid duplication of the work of the royal commission, and we have not engaged in a thorough examination of the many confidentiality questions relating to the health services field. The Commission and its research staff have enjoyed frequent and beneficial association with the staff of the royal commission and its chairman.

#### B. THE NATURE OF THE ISSUES

Since 1766, the Swedish constitution has provided citizens the right of access to official government documents, as part of the Freedom of the Press Act. In recent years, freedom of information laws have been introduced in many western European countries, and in many jurisdictions of the United States. In 1967, the U.S. Federal government enacted a freedom of information law which has since been substantially revised. Some U.S. state governments had already enacted so-called "open-records" laws; many of these have been revised so as to conform more closely to the federal Freedom of Information Act. Other states have introduced freedom of information laws (modelled on the federal act) for the first time. The adoption of these laws in the United States has been accompanied by the adoption, at both the federal and state levels, of so-called "sunshine" laws which require, in essence, that government agencies conduct their decision-making processes in meetings which are open to the public.

A primary concern of this Commission, then, was whether a need for similar legislative initiatives exists in Ontario. Serious consideration was given to the question of whether legislative models from Scandinavian and U.S. jurisdictions, whose systems of government differ to some extent from our own, would be appropriate in Ontario.

The informational privacy issue has been the subject of legislation in a number of jurisdictions, both in the United States and in Europe. For the most part, legislation adopted in the United States has attempted to resolve the informational privacy problem by granting individuals certain procedural rights relating to government files containing personal information about them. They are granted a right to see and copy such files and to seek correction of erroneous information. A similar scheme has been enacted by the federal government of Canada in Part IV of the

Canadian Human Rights Act[1]. European legislation, on the other hand, has typically involved the establishment of a regulatory scheme delineating the terms and conditions under which data banks containing personal information may be established and maintained. Once again, we were pressed to consider whether the personal information-handling practices of the Ontario government warrant similar legislative initiatives.

#### C. THE RELATIONSHIP OF FREEDOM OF INFORMATION TO PRIVACY PROTECTION

We have referred to the tension which exists between claims for greater access to government information and the interest of individuals in the protection of their privacy. A 1972 federal report in Canada emphasized this point:

Not surprisingly, the public increasingly demand information from government and business to ensure their accountability to the people and to increase the latter's participation in the regulation of public affairs.

But while the individual, as a member of the public, seeks "freedom of information" or the "right to know," in his personal life he claims a right to privacy. Some accommodation between the two interests, therefore, must be made. If the privacy of the individual is to be protected, there will be occasions when information cannot be divulged. In other situations, personal information about an individual may be of such vital concern to society that the individual's privacy must be sacrificed.

It is not always true that one or other of these twin rights must prevail in any given circumstance. Various situations may permit more subtle differentiation giving each of these rights some recognition. For example, governments and business organizations may, in the interests of social planning or efficiency or other social needs, be justified in obtaining information on a wide variety of matters even though the individual may consider it sensitive or closely related to his economic interests. It by no means follows, however, that government and business are justified in making this information available to the public in the name of some abstract notion of "freedom of information." Again, a member of the public may have a legitimate interest in gaining access to a document or government file containing information of personal interest to him, but this interest may have to be balanced against that of others where the document or file also contains personal information about them or sets

forth their personal opinions.... It is obvious that the inevitable tension between "freedom of information" and the "right to privacy" cannot be resolved in terms of abstract formulae. Rather the task demands a sensitive balancing in the context of particular situations[2].

The problem of reconciling these tensions is discussed throughout this report; however, it may be useful at this point to indicate in a general way the possible points of conflict between the two competing policy objectives.

The U.S. experience has isolated the principal problem areas:

1. How is the principle of the public right to know to be reconciled with the protection of privacy where access is sought to government documents containing personal information about persons other than the individual making the request?
2. What controls, if any, are there to be on the disclosure of personal information which may be exempt from disclosure under the freedom of information (FOI) scheme but which, nonetheless, the government may be willing to disclose? To put the question differently, should a privacy exemption be "discretionary" or "mandatory"?
3. If the privacy scheme embodies as one of its privacy protection devices the granting of a right of access to individuals to government documents containing information about them (a subject access scheme), are there exemptions to this principle of access, and, if so, how do they relate to the exemptions under the FOI scheme?
4. Are the procedural mechanisms, administrative arrangements and appeal mechanisms with respect to the FOI and subject access schemes properly integrated?

Each of these issues is considered as it arises in our recommendations relating to freedom of information and privacy protection. In Volume 3, Chapter 39, we return to these themes and indicate the general structure of the reconciliation which we propose.

CHAPTER 1 NOTES

1 S.C. 1976-77, c. 33.

2 Department of Communications and Department of Justice,  
Privacy and Computers (Ottawa: Information Canada, 1972)  
120-21.

## CHAPTER 2

# The Public Hearing Process

### A. DESCRIPTION OF THE PROCESS

From the outset, we have attempted to involve the Ontario public in our discussions and deliberations. In May 1977, we placed advertisements in a number of Ontario newspapers outlining our terms of reference and inviting the public to make submissions [1]. In an effort to obtain as wide a cross section of opinion as possible, we also communicated with a variety of individuals and groups likely to be interested in the issues. During the summer of 1977, Dr. E.E. Stewart, Secretary of the Cabinet, solicited comments and submissions from government ministries with respect to the issues raised by our terms of reference, and these were also passed on to us for our consideration.

In response to our advertisements and requests, we received a total of 115 briefs from the public and 25 from deputy ministers and other government officials. The majority of these briefs were presented during the twenty-six days of public hearings held by the Commission[2]. All submissions received were treated as briefs, whether elaborate presentations of public interest groups or a one-page letter from a single concerned citizen. Everyone was given the same opportunity to appear before and speak to the Commission, even if a formal brief had not been submitted.

We express our thanks to all those who made submissions and appeared at the public hearings. The briefs and the public discussions were of great assistance to us in our task.

### B. OUTLINE OF BRIEFS PRESENTED

The briefs received by the Commission represent the views of a cross section of the Ontario public. As well as comments and opinions from thirty-two individuals, the Commission received briefs from a number of groups and organizations speaking on behalf of their memberships. These included community workers, public interest groups, business organizations, the media, native peoples' organizations, the opposition parties in the Ontario legislature, the Association of Municipalities of Ontario, university administrators and faculty associations, students, and various professional associations representing writers, librarians, researchers, doctors and social workers[3].

The majority of submissions received from the public dealt with both aspects of the Commission's terms of reference, although some stressed one more than the other. Fifty-five dealt mainly with freedom of information, twelve mainly with individual privacy, and the remainder dealt with specific problems of access or matters related to freedom of information and individual privacy. The tension between these issues was brought forcefully to the attention of this Commission with the presentation of the first two briefs. The National Cancer Institute argued that access to identifiable personal data relating to individuals was a necessary tool in the conduct of medical research. The Ontario Medical Association, on the other hand, urged that all identifying information be deleted from medical records which are stored and used for research purposes, on the grounds that the risks of invasion of privacy outweighed any benefits which might be derived from medical research[4].

#### FREEDOM OF INFORMATION

Among those submissions which dealt mainly with freedom of information, there was a very strong consensus in favour of legislation to establish a public right to government information. These briefs repeatedly made similar points which can be summarized as follows:

1. A public right to government information should be recognized as a fundamental part of democratic government; government secrecy fosters distrust of government on the part of the citizenry.
2. Legislation is the most effective means of ensuring that this right is recognized and protected.
3. The need for certain exemptions is acknowledged -- but these should be narrow, specific and clearly defined.
4. There should be specific time limits within which government should be required to respond to requests for information.
5. The legislation should contain appeal provisions and the appeal body should be independent of the government.
6. The costs to be borne by the person seeking information should be kept as low as possible.

7. There should be a complete and constantly up-to-date system of indexes published by the government listing what information is available and its location.
8. Freedom of information legislation should apply not only to the provincial and municipal governments but also to boards, Crown agencies, Crown corporations, universities and any other institution in Ontario that receives all or any of its financing from the province of Ontario.

#### INDIVIDUAL PRIVACY

The briefs which dealt with individual privacy were mainly concerned with two issues:

1. Individuals should have the right to examine any files which the government compiles about them.
2. The use of unique personal identifiers (such as the SIN combined with the computerization of government records) presents a great potential for privacy invasion which must be controlled by legislation.

It should be noted that item 1 above -- the right of access to one's own government file -- was often treated as an essential part of a freedom of information scheme, and again, there was virtually unanimous agreement that this kind of access should be the right of every person in Ontario.

#### DISCUSSION

While a comprehensive review of all the briefs cannot be undertaken here, we think it would be useful to discuss some of the public's concerns about government secrecy and individual privacy as they were expressed to us.

Many briefs emphasized the relationship of freedom of information to political democracy and suggested that the establishment of a "public right to know" would improve the quality of political life in Ontario. For example, I.D. and H.M. Willis (former publishers of the Alliston Herald), suggested that although the injection of some vitality into democracy as it now exists in Canada would not be easy, "the malaise may be lessened by a vigorous policy of ensuring the public right to know and demonstrating the willingness to hear, heed and consider people as individuals"[5].

The brief from the Chemong Lakeside Ratepayers' Association of Omemee, Ontario, stressed that when governments, both provincial and local, make decisions "with great secrecy and without explanation or investigation as to how their plans will affect the lives of the people whose best interest they are supposed to be protecting and even improving," the public will lose confidence in government and become "totally fed up." Although politicians may perceive this as public apathy, in the opinion of the association "it is cynicism, disillusionment and even outright distrust"[6]. In other words, governments themselves create these conditions -- the public merely reflects the government's unwillingness to trust the people. In this view, a legislated public access scheme would offer evidence that the government accepts the proposition that the people of Ontario have a right to take part in the decisions that affect their lives.

Similar concerns were expressed by a variety of other individuals and groups, including the Ontario Hospital Association[7], native peoples' organizations[8], university administrations[9], and community groups[10], all of whom cited specific instances in which information had been withheld from them by the government, thereby inhibiting or nullifying their ability either to make a contribution to the policy-making process or to affect government decisions.

Several business organizations stated that, although there was usually ample opportunity to submit briefs and offer advice to government, in their experience this usually occurred when it was too late for their views to have real impact on the final decision [11].

Many briefs, then, indirectly raised the issue of whether the public should have access to internal "working papers," including the opinions and advice of civil servants. The Canadian Manufacturers' Association recommended that advice and opinions of civil servants should be exempt from public disclosure only when they are part of a submission to Cabinet or to a minister to assist in the making of a specific policy decision. In the opinion of the CMA, when the "advice" is not a statement of government policy, then it should all be publicly available -- be it advice, opinion, recommendation, analysis, or fact[12].

A number of briefs, including those from public interest groups and university faculties, stated that too many government research reports and studies were withheld from the public entirely or were made available only to a select few[13]. They stated that a denial of access to this kind of information severely hampered their ability to carry out their own research, thereby diminishing the sources on which society could draw in seeking solutions to pressing social problems. Some university

teachers felt themselves caught between an increasing public demand that universities do more "socially relevant" research and the increasing difficulty of gaining access to information from government which could assist them in fulfilling this role. Underlying these views was their concern that the monopolization of information by any single group in society could restrict the free flow of ideas and be used to channel public discussion and debate into areas which that group deems desirable.

The briefs from the opposition parties in the Legislative Assembly expressed similar concerns[14]. They also stressed the problems they experienced in obtaining information from the government, and stated that the denial of information hampered them in performing their constitutional role of holding ministers accountable to the electorate, thereby weakening the system of responsible government. The parties took the position that freedom of information legislation was needed both to strengthen and to democratize our government institutions.

Many of the submissions from newspapers and the broadcast media also felt that government secrecy hindered them in performing their social role of informing the public. They particularly stressed their problems of getting access to information at the local government level, including access to meetings of public bodies[15]. Many community groups had similar concerns. According to these briefs, it appears that the struggle for "responsible government" is still being waged at the local level in some Ontario communities.

In its brief, the Association of Municipalities of Ontario, which represents municipal governments in Ontario, acknowledged that the existing law had led to much confusion and uncertainty among its membership with respect to public access[16]. For this reason, the association gave its support for the idea that municipal governments should be subject to any future freedom of information legislation. In particular, it recommended that new legislation should establish "clear rules concerning the conduct of public business by stipulating that all meetings of councils, committees of council, and local boards shall be open to the public," subject only to certain specified exemptions. Furthermore, this legislation should place all municipal records in the public domain and specify any exceptions. Any disputes concerning freedom of information at the municipal level should be resolved by the courts or by a tribunal set up for that purpose.

Many of the briefs we received dealt specifically with procedural aspects of freedom of information legislation[17]. The need for narrow and carefully drawn exemptions was emphasized as a means of ensuring that only a very limited range of information could be withheld. The imposition of strict time limits for

decisions by officials to grant or deny access was considered essential. Costs were also frequently discussed. It was strongly recommended that the fees charged to persons requesting information should be kept as low as possible to ensure equality of access. There should also be provision for the waiving of fees in certain cases. As one observer stressed, "the legislation should not place governments in a position to use costs of information as an unreasonable barrier to freedom of information"[18].

Thus, many of the submissions showed an awareness of the problems first experienced in the United States because of the failure of the 1966 Freedom of Information Act to deal with these procedural aspects. They noted that U.S. government employees had used delaying tactics in responding to requests and charged very high fees in order to frustrate the operation of the act. Several corrective amendments were made in 1974 and 1976. It was strongly recommended that such problems should be avoided in Ontario from the start. The possible expense involved in the administration of freedom of information legislation, including publication of indexes listing the type and location of all government information, was considered. As the submission of the Greater Barrie Chamber of Commerce put it, "there is already a greater cost in public distrust of governments and politicians, and decisions made with secret information. There are sometimes very costly results when studies, never made public, lead to government action when disclosure would have altered the decision through an informed public opinion"[19]. Some suggested that public funds which were now spent on public relations material distributed by government could be put to better use in administering a freedom of information scheme.

A final procedural aspect on which there was general agreement was the need for the legislation to provide an appeal mechanism independent of government. Many briefs suggested that the courts were the most appropriate tribunal; others favoured an independent commissioner with the power to order disclosure of documents. All agreed that the decision to grant or deny access to government-held information should not be left in the hands of government itself.

In the area of personal privacy, the right of an individual to have access to his own government file was recognized as crucial. At the federal level, this principle has been embodied in the Canadian Human Rights Act, 1977[20]. In Ontario, no equivalent legislation exists.

A number of briefs also raised serious questions concerning the collection and use of personal information by the Ontario government, especially in the context of increasing computerization of record files. As several briefs pointed out, the

increased use of Social Insurance Numbers or other personal identifiers, combined with the use of computerized information systems, make possible the almost instantaneous integration and retrieval of all kinds of personal information about individuals. In its brief to the Commission, the Ontario Medical Association expressed concern about "the possible consequences of widespread distribution of information about [an individual's] personal, financial, medical or even social status..." and declared that "the potential for damage to the personal lives of citizens through misuse of all the personal information that is stored in computers is frightening"[21].

Similar views on the potential for grave invasions of privacy by computerized information systems were expressed by the Staff Association of the Metropolitan Toronto Children's Aid Society [22] and the Ontario Health Records Association[23], as well as several individuals. Other briefs did not disagree with this assessment, but pointed out that an outright ban on distribution of all personal information could have other equally serious consequences.

The National Cancer Institute, which is engaged in epidemiological research on the role of environmental and occupational factors in causing cancer, argued in its brief that it needed access to many kinds of individually identifiable records in order to carry out its work effectively, and that it favoured the use of the Social Insurance Number as a unique personal identifier for epidemiological research[24]. In its view, a statutory prohibition on transfer of personal information about individuals would curtail essential medical research. A group of social scientists at the University of Guelph also expressed their need for access to information about individuals for research purposes[25].

Clearly, some balance must be struck between the need to protect the privacy of individuals and the need to ensure that research beneficial to society is not made impossible. In its brief, the Canadian Civil Liberties Association suggested several criteria which could be used as guidelines in making these difficult decisions, including the adequacy of existing safeguards and the existence of alternative sources of information[26].

In summary, then, the briefs and submissions we have received not only raised important issues but also made valuable suggestions and recommendations, all of which have been of great assistance to us in our study. The responses to our Commission demonstrate that the Ontario public is vitally interested in legislative action on freedom of information and individual privacy.

## CHAPTER 2 NOTES

- 1 These advertisements appeared in 45 Ontario dailies and 334 weeklies, including 6 in the French-language press.
- 2 Public hearings were held in Toronto, Kitchener, London, Hamilton, Ottawa, Kingston, Windsor and Timmins. The Commission received the submissions of the Ministry of the Solicitor General, the Ontario Provincial Police Commission and the Ministry of Treasury, Economics and Intergovernmental Affairs at in camera sessions.
- 3 A complete list of the briefs appears in Volume 1, Appendix A.
- 4 National Cancer Institute, Brief No. 1, and Ontario Medical Association, Brief No. 2.
- 5 I.D. and H.M. Willis, Brief No. 6.
- 6 Chemong Lakeside Ratepayers' Association, Brief No. 7.
- 7 Ontario Hospital Association, Brief No. 61.
- 8 Grand Council Treaty No. 9, Brief No. 73; Union of Ontario Indians, Brief No. 87.
- 9 Carleton University Senate Committee on Freedom of Information and Individual Privacy, Brief No. 75; Queen's University, Principal's Ad Hoc Committee, Brief No. 57.
- 10 Ontario Public Interest Research Group (OPIRG), Brief No. 50; OPIRG, Brief No. 45; Pollution Probe, Brief No. 88.
- 11 Ontario Chamber of Commerce, Brief No. 49; Hamilton District Chamber of Commerce, Brief No. 79.
- 12 Canadian Manufacturer's Association, Ontario Division, Brief No. 62.
- 13 Canadian Environmental Law Association, Brief No. 44; Pollution Probe, Brief No. 88; E.J. Farkas, Associate Professor, University of Waterloo, Brief No. 25; Roger Suffling, Professor, University of Waterloo, Brief No. 26; University of Guelph, Department of Family Studies, Brief No. 33.
- 14 Official Opposition, Brief No. 91; Ontario NDP Caucus, Brief No. 42.

- 15 For example, see Chatham Daily News, Brief No. 24; Kitchener-Waterloo Record, Brief No. 34; Radio-Television News Directors Association of Canada, Brief No. 86; The Sault Star, Brief No. 69.
- 16 Association of Municipalities of Ontario, Brief No. 90.
- 17 See, for example, Ontario FOI Citizens Committee, Brief No. 39; ACCESS, A Canadian Committee for the Right to Public Information, Brief No. 53; Ken Rubin, Brief No. 51; Sunshine: The Association for a Right to Information, Brief No. 80; Writers' Union of Canada, Brief No. 70.
- 18 T.B.G. Whitehead, Brief No. 59.
- 19 Greater Barrie Chamber of Commerce, Brief No. 40.
- 20 S.C. 1977, c. 33.
- 21 Ontario Medical Association, Brief No. 2.
- 22 Staff Association, Metropolitan Toronto Children's Aid Society, Brief No. 67.
- 23 Ontario Health Records Association, Brief No. 83.
- 24 National Cancer Institute, Brief No. 1.
- 25 University of Guelph, Department of Family Studies, Brief No. 33.
- 26 Canadian Civil Liberties Association, Brief No. 92.



## CHAPTER 3

# The Research Program

### A. A GENERAL OVERVIEW

As we have indicated, our assignment was one of research and reflection, with a view to developing proposals which would foster the goals of greater public access to government information and of protection of privacy in the context of personal information-handling practices of the government.

With this background in mind, research became a central feature of the work of the Commission. At an early stage, research plans were laid with the following objectives in mind:

- the preparation of a description of current practice and law respecting public access to government information and privacy protection in Ontario;
- a description of existing or proposed freedom of information and privacy protection schemes in other jurisdictions in Canada, and in the United States, Australia and Europe;
- the preparation of various proposals for increasing access to government information and for protecting privacy, and an assessment of their merits and deficiencies.

In general terms, the research program has been organized into three phases or stages of inquiry. The first phase involved detailed planning of the program, and the preparation of our basic research. In the second phase of the program, specific research projects were undertaken. The third phase of the research program consisted of the preparation of more detailed accounts of legislation relating to freedom of information and individual privacy in force in other jurisdictions, as well as other background memoranda in support of the Commission's decision-making process. A detailed agenda of decisions to be taken was prepared, together with supporting documents outlining various options open to the Commission.

At an early stage, we resolved that we would depart from traditional practice by publishing research papers prepared for the Commission as they became available. It was our hope that the publication of these papers would stimulate interest and public discussion of the issues with which we were concerned. Moreover, we felt that the Commission's research work would make a significant contribution to the literature on freedom of information and privacy, and that it should be placed in the public domain as quickly as possible. We have been gratified by the wide distribution which these papers appear to have enjoyed, and the comment and reaction which they have provoked.

#### B. THE RESEARCH PAPERS

The following are the research publications of this Commission:

1. Donald V. Smiley, The Freedom of Information Issue: A Political Analysis. Professor Smiley's paper traces the relationship between the availability of government information and the general theory of democracy. In particular, Professor Smiley offers a view of the idea of accountability and addresses the question of access to public information as a human right. He places the freedom of information issue in the Canadian context by outlining the relevant aspects of Canadian political institutions and political culture. Finally, Professor Smiley offers his own view of the proper design of a freedom of information scheme.
2. Kenneth Kernaghan, Freedom of Information and Ministerial Responsibility. Professor Kernaghan begins his paper with a dissection of the concept of ministerial responsibility into its various elements. He assesses each element in turn and offers a view of its current status. Professor Kernaghan engages in an analysis of the main features of freedom of information schemes pertinent to his theme and concludes by offering a view of the significance of the doctrine of ministerial responsibility in the design of a freedom of information scheme.
3. Donald C. Rowat, Access to Government Documents: A Comparative Perspective. Professor Rowat's paper presents a comprehensive survey of freedom of information laws in force in the United States, Canada, and Europe. He gives an account of recent developments in other jurisdictions where such schemes are under consideration. Finally, Professor Rowat offers a statement of what he views as the central features of a freedom of information scheme and the lessons to be learned from the experiences of other jurisdictions.

4. T.G. Ison, Information Access and the Workmen's Compensation Board. Professor Ison's study provides a full account of the information access policies of the Ontario Workmen's Compensation Board. Much of the study focuses on the processing and disposition of claims advanced by injured workers for an award of compensation under the Ontario Workmen's Compensation Act. Professor Ison offers numerous suggestions for the improvement of the Board's information practices. In particular, he considers at some length the general problem of access to files containing medical information and concludes that access to such files should be permitted.

5. David H. Flaherty, Research and Statistical Uses of Ontario Government Personal Data. Professor Flaherty's paper deals with the use of personal information for research and statistical purposes by a number of Ontario agencies. The practices of the Office of the Registrar General, Central Statistical Services, the Ministry of Health, the Hospital Medical Records Institute, the Ontario Cancer Treatment Research Foundation, and the Alcoholism and Drug Addiction Research Foundation are examined. Professor Flaherty offers a number of suggestions for improvement of the information practices of these agencies. The study also considers the difficulties involved in ensuring adequate access to personal data for research and statistical purposes.

6. Hugh R. Hanson et al., Access to Information: Ontario Government Administrative Operations. This study consists of an examination of the kinds of information documents which the government collects and uses in the course of its ongoing administrative activity, and indicates the kinds of problems which must be addressed by a freedom of information law applicable to such activities. The paper describes a number of practices relating to licensing and regulation, investigation and inspection, taxation, contracting, standard setting, research, financial administration, program delivery, and intergovernmental programs. The major problems are those associated with the handling of information concerning private individuals and business entities. (Mr. Hanson was assisted in this study by Francine Latremouille and Susan Rowland.)

7. Stanley Makuch and John Jackson, Freedom of Information and Local Government in Ontario. This paper describes information practices in municipal councils, school boards and police commissions in a sampling of Ontario municipalities of varying sizes and locations. The authors explore the need to assure the right of the public to attend deliberations and to obtain information, and make recommendations for the improvement of current practices in these areas.

8. Mark Q. Connelly, Securities Regulation and Freedom of Information. Professor Connelly describes the information practices of the Ontario Securities Commission, and compares its experience with that of its U.S. counterpart, the federal Securities and Exchange Commission, which must conduct its activities within the provisions of the U.S. Freedom of Information Act. Professor Connelly's paper also describes that act and concludes with recommendations for the improvement of information practices in the securities regulation field.

9. David J. Mullan, Rule-Making Hearings: A General Statute for Ontario? Professor Mullan outlines current Ontario and federal Canadian law and practice relating to the rule-making activities of government departments and agencies. He also describes the experience of American government agencies operating under the "notice and comment" requirements of the U.S. Administrative Procedure Act and suggests that similar provisions could usefully be adopted in Ontario in order to facilitate public participation in similar policy formulation.

10. Larry M. Fox, Freedom of Information and the Administrative Process. Mr. Fox examines the information access practices and problems relating to the exercise of statutory decision-making powers of public officials and agencies. Included in this study are descriptions of the work of a number of tribunals (such as the Criminal Injuries Compensation Board, the Environmental Assessment Board, and the Ontario Energy Board) and individual officials engaged in the administration of such government programs as vocational rehabilitation and the provincial welfare benefits scheme. A major focus of this study is the problem of so-called "secret law," the internal administrative guidelines, manuals and directives used by public officials in the exercise of their discretionary powers. Mr. Fox recommends that these materials be made available to the public.

11. Timothy G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law. This paper provides a description of the current laws of Ontario pertaining to information access and privacy protection. In particular, the author deals with the considerable number of "statutory secrecy provisions" sprinkled throughout the laws of Ontario which provide that public officials must treat certain types of information as confidential. The study indicates that the existing law of Ontario does not treat either the public right to know or the right of individual privacy in a systematic or comprehensive fashion.

12. Laurel Murdoch and Jane Hillard, with the assistance of Judith Smith, Freedom of Information and Individual Privacy: A Selective Bibliography. This is a revised version of the bibliography prepared by the authors for the use of the Commission's research staff and consultants. The revision takes into account material unearthed by the research staff as well as material published after the first bibliography was prepared. The bibliography is international in scope, although emphasis has been placed on Commonwealth countries and Canada in particular. Topics include computers and privacy, eavesdropping, freedom of information, government and media, government information, government publishing, government secrecy, privacy, privileges and immunities, and security classification.

13. John Eichmanis, Freedom of Information and the Policy-Making Process in Ontario. This study provides a foundation of factual material and analytical discussion on which to base an assessment of the potential impact of the freedom of information laws on the policy-making processes of the Ontario government. Mr. Eichmanis discusses policy making at senior levels of ministries, in the Cabinet Committee system, and ultimately in the Legislative Assembly. The paper describes the major institutions and actors involved in this process, including the Cabinet and its committees, the civil service, MPPs, and public interest groups. It includes a report of five case studies undertaken to examine actual documents generated by the policy-makers, and indicates the current availability of these documents to the public. In the concluding section, the author identifies and discusses the major problems he envisages in developing a freedom of information policy for this area of governmental activity.

14. I.A. Litvak, Information Access and Crown Corporations. Professor Litvak begins his paper by suggesting possible classifications of types of Crown corporations. He then focuses on the information practices and policies of Ontario Crown corporations engaged in commercial activity, in an attempt to identify problems associated with the implementation of a freedom of information policy applicable to such bodies. More particularly, the author gives an account of the information practices of Ontario Hydro, the Urban Transportation Development Corporation, and the Ontario Northland Transportation Commission. He concludes that bodies such as these can and should be covered by a freedom of information scheme, provided that appropriate exemptions are included to accommodate the particular need for secrecy which derives from their commercial or competitive character.

15. Michael Brown, Brenda Billingsley and Rebecca Shamai, Privacy and Personal Data Protection. This study provides a comprehensive view of the personal record-keeping practices of Ontario governmental institutions and presents a framework within which to analyze the privacy protection implications of personal data information systems. Special attention is devoted to the significance of the use of computerized information systems and personal identifiers such as the Social Insurance Number. An account is given of the data protection schemes in force at the federal level in Canada and the United States and in a number of European jurisdictions. The second part of the study consists of a number of case studies of personal information systems operated by the government of Ontario. Major case studies were undertaken with respect to information systems related to social services programs, educational records, government personnel records, health records, and law enforcement information systems. As well, more limited studies were undertaken with respect to corrections, probation and parole records, the personal property security registration system, and the licensed driver and vehicle ownership records.

16. Heather Mitchell, Access to Information and Policy-Making: A Comparative Study. This study examines the legal mechanisms in place in Sweden and the United States which facilitate public access to information related to government policy-making processes. It also examines the various legislative proposals recently brought forward in Australia. In addition, the study describes the structure of government in each country and the way in which the requirements for openness and freedom of information laws affect policy-making activity. In a concluding section, the author suggests that a number of useful lessons can be learned from the approaches taken to the question of public access to policy-making material in these three jurisdictions.

17. Susan Soloway, Public Access to Commercial Information in Government Files. This study examines the extent to which commercially valuable information is recorded in government documents and the potential difficulties involved in applying a freedom of information scheme to records of this kind. The paper briefly describes the activities of the government of Ontario that involve the use of such information, and offers an account of the treatment accorded the question of public access to such information in the legislation of other jurisdictions. The author concludes with suggestions for the design of an exemption for commercially valuable information, which would accommodate the legitimate interests of the government and the private sector in confidential treatment of commercially valuable information.

## CHAPTER 4

# Competing Considerations

In this chapter we identify the major arguments for the adoption of freedom of information schemes: the need to render government more accountable to the electorate; the desirability of facilitating informed public participation in the formulation of public policy; the need for fairness in decision making affecting individuals; and the protection of personal privacy. The potential administrative burden imposed on government by freedom of information legislation is also discussed.

### A. ACCOUNTABILITY

A distinguished Canadian public servant has said that

The tradition of administrative secrecy which we inherited as part of the parliamentary system from Britain has certainly encouraged suspicion of government.... Secrecy leads to distrust and fear on the part of the public.... As the size of the public service grows and as the element of secrecy persists, the citizen is asking quite correctly not only what decisions are being made but how they are being made[1].

Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the legislature would be enhanced if members of the legislature were granted greater access to information about government. The executive's responsibility to the legislature and, ultimately, to the electorate, is a fundamental feature of our system of government. If neither the citizens nor their representatives are able to obtain adequate information about the decisions of the executive, this traditional mechanism of public accountability cannot operate effectively.

Although public discussion of the need for legislation establishing broad rights of public access to government-held information is a relatively recent phenomenon, it has long been recognized that an informed populace is vital in a democratic society. James Madison said in 1822:

A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors must arm themselves with the power which knowledge gives[2].

Today, our governments are asked to solve increasingly diverse problems; in order to provide these solutions, public institutions have grown dramatically in size and complexity. They have adopted sophisticated (and in some cases potentially hazardous) technologies of all kinds. The computerized information files maintained by governments are only one example of the intricate systems used to develop and administer policies and programs. The systems and machinery of modern government, however necessary and however well-ordered, cannot help but place strains on the traditional mechanisms of political accountability. In an era when governments must draw upon increasing levels of public confidence and trust, it is not surprising that citizen demands for more effective means of scrutinizing public affairs are being voiced. Although the enactment of freedom of information legislation may not completely resolve this dilemma of modern political life, a reduction in government secrecy is a necessary prerequisite to the restoration of a relationship between the electorate and the government that is consonant with democratic ideals. In a research paper prepared for this Commission, Professor Donald V. Smiley concluded that "only by more widespread dispositions toward openness at the highest levels of government can the declining legitimacy of political institutions be arrested"[3].

#### B. PUBLIC PARTICIPATION

The value of citizen participation in the formulation of public policy is often cited in support of the adoption of freedom of information legislation. Although freedom of information laws themselves do not establish an institutional framework for public participation, an informed citizenry is better able to make effective use of the means of expression of public opinion on political questions.

The government of Ontario, recognizing the value of public participation in decision-making processes, has established a variety of mechanisms to encourage interested groups and individuals to present their views to the government when policy choices are being evaluated. Advisory councils, task forces, royal commissions and other special-purpose boards and commissions are often assigned the task of soliciting public opinion. The decision-making processes of government benefit in two ways when

informed citizens take part: first, a wider spectrum of the Ontario public will be contributing expertise and informed comment; second, when an opportunity for participation in decision making is given, the eventual decisions will likely be more acceptable to the people. The perception that decisions have been fairly made on the basis of pertinent and accurate information can only enhance the willingness of citizens and groups to abide by those decisions, even if they consider them to be contrary to their own interests.

#### C. FAIRNESS IN DECISION MAKING

Fairness in decision making requires that individuals who are affected by administrative adjudications or decisions be given an opportunity to present their sides of the issues. In order to do this effectively, they should be given access to the information on which the decision maker will act, including the criteria to be applied. Making decisions on the basis of facts or criteria that are not disclosed to the person whose rights may be determined is contrary to basic principles of fairness and undermines public trust in the decision-making process.

In Ontario, the provisions of the Statutory Powers Procedure Act and the rules of natural justice require many types of decision-making bodies to adhere to these values of fairness. However, in administrative contexts where the need for a substantial volume of determinations affecting individuals arises -- such as the granting of compensation for injured workers or various forms of public assistance -- it has been considered impracticable to extend the full range of procedural safeguards established by these legal requirements to decisions made in the first instance. Some observers have suggested that the right of access to government documents pertaining to such decisions would ensure that an appropriate minimum level of procedural fairness would be accorded to affected individuals.

#### D. PERSONAL PRIVACY

As the scope of benefits and services provided by government to the public has increased, so have the number and kinds of personal records held in government files. Extensive collection of personal data by government has led to public concern that the cumulative effect of government record-keeping practices will be to depreciate important values of personal privacy. The granting of a right to individuals to have access to government files concerning them is thought to be a means of reducing the intrusiveness of these record-keeping practices. In Volume 3 of this

report the implications of the growth of government personal data systems will be considered at length.

#### E. ADMINISTRATIVE COSTS

While there are strong arguments in favour of opening government to greater public scrutiny, other factors arise which must be considered. The most obvious are the potential administrative burdens and costs. In the submissions we received from government officials, concern was expressed about the capacity of the public service to handle increased demands within the existing budgetary constraints.

It is true that freedom of information legislation would require staff to spend time searching for material, deciding whether information requested should be released, copying material, replying to requests and responding to appeals. However, it is possible to exaggerate the extent of these demands. For the most part, the officials interviewed by our research staff did not anticipate that policies of greater openness would result in a significant volume of requests from members of the public.

The speed and efficiency with which requests are handled will depend on how well existing government records are indexed and organized. In a later chapter of this report, we describe the records management program now in operation in the Ontario government[4]. This program involves the indexing and scheduling of all government records and should be of assistance to government employees in locating and retrieving information. We understand that more than 80 per cent of government records are now scheduled under this program. In practice, the need to process requests for information under access legislation may give added impetus to efforts to improve the efficiency of government record keeping. This has been the experience of other jurisdictions[5]. To the extent that freedom of information legislation may lead to the introduction of more streamlined and cost-efficient record-keeping procedures, offsetting savings will be achieved.

Although it is obviously difficult to assess accurately the potential cost burdens of a freedom of information scheme, it is possible that some of the burden may in fact be reduced by rearranging and making more effective use of existing resources within the public service. Later in this report, in our discussion of current communications policies and programs of the Ontario government, we observe that in 1977-78 the government spent approximately \$50 million and employed over 300 people in providing information services to the public[6]. It may well be that at least part of the apparent freedom of information workload

of most governmental institutions could be absorbed by existing information branches. In some cases information which could be requested under freedom of information legislation may already be released routinely. In other cases, as experience with the legislation increases and a climate of openness develops, information which was once withheld may come to be released on a routine basis without waiting for requests from members of the public.

Moreover, it should be said that under current practice most requests for information must be referred to senior branch officials for a decision, with the result that these officials must spend time reading each document requested in order to decide whether it should be released to the particular requester. Under a freedom of information scheme, the adoption of clear and uniform standards for releasing information would relieve senior officials of this time-consuming task. Decisions in all but the most contentious cases could be delegated to specially-trained information officers.

Even though there may be cases where savings can be made, it cannot be denied that there will be some costs associated with the implementation of freedom of information legislation in Ontario. These costs must be weighed against the benefits for society which will flow from more open government. It is evident that a precise cost-benefit calculation cannot be made. How does one measure the value of increased public confidence in the integrity of public institutions? There may be situations in which the benefits of visible governmental processes are tangible. Open government may be, to some extent, more efficient government; the prospect of publicity is a healthy disincentive to waste. Further, the effect of public awareness of and participation in decision-making processes may reduce the intensity of protracted public debate concerning proposed government initiatives. It is simply inefficient for governments to make decisions and to devote considerable resources to the development of programs only to have them subsequently either rejected by an angry public or subjected to the expense and delay of prolonged reconsideration and inquiry. For the most part, however, the benefits of a more open relationship between the electorate and the government are likely to be less tangible. That the benefits are intangible, however, does not mean that they are unsubstantial.

## CHAPTER 4 NOTES

- 1 H. Ian MacDonald, "Evolving Patterns of Government Organization" (1976) 83 Queen's Quarterly, 461.
- 2 James Madison, President of the United States, 1809-1817, in a letter to W.T. Barry, August 4, 1822, quoted in EPA v. Mink, 410 U.S. 73, 110-11 (1973).
- 3 D.V. Smiley, The Freedom of Information Issue: A Political Analysis (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 1, 1978).
- 4 See Chapter 8, Section F.
- 5 For example, the Australian Department of Trade and Resources reported that, in anticipation of the enactment of freedom of information legislation, it had embarked on a project designed to integrate its information holdings and to improve its internal management of current information: Australian Senate Standing Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979) 83.
- 6 See Chapter 8, Section E.

## CHAPTER 5

# Constitutional Dimensions of the Issue

Our terms of reference directed us to consider possible changes in public information practices which would be "compatible with the parliamentary traditions of the Government of Ontario." Most freedom of information legislation has been enacted in jurisdictions whose governmental processes and structures differ in certain respects from our own. (Nova Scotia and New Brunswick, the two Canadian provinces with freedom of information laws, are the exceptions.) Although the influence of American experience on public discussion of the freedom of information question in Canada is understandable, the significant structural differences between the congressional and parliamentary systems of government suggest that care must be taken to ensure that the enactment of a freedom of information scheme drawing on the American experience would not undermine the effectiveness of valuable parliamentary traditions and conventions. In this chapter we consider the constitutional dimensions of the freedom of information issue. In particular, we consider the extent to which the doctrines of individual and collective ministerial responsibility may appear to be inconsistent with a more open style of government. We will also refer briefly to the general nature and significance of federal-provincial relations in the Canadian political context in order to anticipate the significance of federal-provincial bargaining processes for a Canadian freedom of information scheme.

It is generally agreed that the following are the major characteristics of a parliamentary system of government:

1. the members of the Cabinet or Executive Council are members of the legislature and participate directly in its decision-making processes;
2. ministers are responsible to Parliament collectively and individually for the administration of their departments;
3. members of the public service are non-partisan, are appointed on the basis of merit, and retain relative anonymity. It is the role of the public service to implement policy decisions made by elected ministers.

The first of these would not be affected in any way by the adoption of freedom of information legislation. The potential

impact of such legislation is on the remaining two features, which find their constitutional expression in the convention of ministerial responsibility. This convention may be said to contain two elements: the collective responsibility of Cabinet ministers to the legislature (and, through it, to the public for the administration of the government as a whole) and the individual responsibility of each minister for the administration of the department he heads. This convention provides a mechanism whereby an identifiable group of politicians can be held accountable to the public for the exercise of the power of the state[1].

#### A. COLLECTIVE MINISTERIAL RESPONSIBILITY

The requirements of the convention of collective ministerial responsibility have been described as follows:

...all members of a Government are expected publicly to support its actions and policies, or if they are not prepared to do so, to resign their offices: all ministers must accept responsibility for all of the activities carried out in the name of the Government. If Parliament should refuse to support the Government's policy then the whole Government must resign or submit itself to a general election. And, if at any election the people refuse to give the Government the requisite support to keep it in power, it must resign[2].

The convention serves to ensure that the legislature and the people can hold the entire government accountable for its actions: the administration must stand or fall together. Under modern political conditions, the effectiveness of the role of the legislature in the operation of this doctrine has been reduced to some extent. If the governing party holds a majority of seats in the house, it is unlikely that the legislature will vote to bring down the government.

The traditional corollary of the doctrine of collective responsibility is that if an individual minister disagrees with government policy and finds himself unable to support it, he is expected to resign from the Cabinet. Since all Cabinet ministers are required to support and defend publicly the policies of the government once they are made, their discussions and deliberations prior to a final decision have traditionally been surrounded by secrecy. In the words of one observer, ministers must be able

...to meet together, to have a full and frank discussion of all aspects of a problem, to make concessions to one another, to seek the best and appropriate solution and then to

enunciate it with one voice...so that the public is not... confused[3].

The confidentiality of Cabinet discussions creates an environment in which alternatives can be more vigorously debated at the Cabinet level. Public unanimity prevents individual ministers from denying responsibility for government policy.

Some of the concern expressed about the implications of freedom of information legislation for collective ministerial responsibility relates to the legislation's possible encroachment upon the confidentiality of Cabinet deliberations. If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.

Clearly, the adoption of legislation granting members of the public a right of access to documents revealing the nature of Cabinet deliberations would be a substantial departure from current practice. In Ontario, upon taking office, Cabinet ministers swear an oath of secrecy not to reveal the nature of Cabinet deliberations[4]. The preservation of the confidentiality of Cabinet discussions would appear to be a necessary feature of a freedom of information scheme "compatible with the parliamentary traditions of the Government of Ontario."

#### B. INDIVIDUAL MINISTERIAL RESPONSIBILITY

The convention of individual ministerial responsibility has traditionally meant that

each individual minister is accountable for his own decisions and for all the actions of the governmental department under his control. He must present his department's programmes to the House, defend its policies and answer questions concerning it[5].

In order to focus responsibility exclusively on the minister, this convention structures the relationship between the minister and the public servant in a particular way. Since only the minister can be held accountable for the actions of the department he heads, then by convention the act of every civil servant must be regarded as the act of the minister[6]. In consequence, if

serious errors in the administration of government are exposed, it is the minister who must resign[7].

Many commentators have observed that the traditional theory of individual ministerial responsibility bears less and less resemblance to modern political practice. With the rise of political parties and the acceptance of the principle of party solidarity, the legislature is simply unable to compel a minister to resign in the face of a serious error if the minister is unwilling to do so and if he still commands the support of the prime minister and his Cabinet colleagues[8].

Professor Finer has written:

We may put the matter this way: whether a minister is forced to resign depends on three factors, on himself, his Prime Minister and his party.... For a resignation to occur all three factors have to be just so: the Minister compliant, the Prime Minister firm, the party clamorous. This conjunction is rare and is in fact fortuitous. Above all it is indiscriminate -- which ministers escape and which do not is decided neither by the circumstances of the offence nor its gravity[9].

Traditionally, two important corollaries arise from the convention of ministerial responsibility. First, civil servants are not directly accountable to the legislature: they are accountable to the minister. Second, civil servants must be politically neutral and personally anonymous.

Because it is the minister in whose name action is taken, civil servants are advisors, not actors.... The advice of civil servants is expected to be frank, impartial and confidential...if a change of government occurs, the same civil servants are expected to be able to advise the new minister on the implementation of policies that may be at complete variance with the policies pursued by the previous administration[10].

In order to preserve this concept of impartiality, then, the advice and opinions of public servants have traditionally been treated as confidential.

The growth of the scale and complexity of public institutions has, to some extent, led to an erosion of the anonymity enjoyed by public servants. In practice, it is virtually impossible for individual ministers to oversee the day-to-day administration of the departments they head. An individual minister may have little direct knowledge of much of what, by convention, is done in his

name. The following description of the activities of federal Cabinet ministers is equally applicable to those at the provincial level:

Ministers divide their time among Cabinet and Cabinet committees, caucus, question period, constituency business, meetings with representatives of interest groups, conducting legislation through the House, and national party business. Of the time available for work concerning the department, a large portion is naturally spent on correspondence and policy work. Because good management requires that ministers address only the most important questions, or those, however trivial, that require political judgment, it is obvious that ministers have little time to get involved with managerial problems, even if they want to[11].

This has led to a shift of certain kinds of responsibility from the minister to the public servant, and with this shift has come a gradual decline in the anonymity of public servants:

Public servants now appear frequently in public forums, on behalf of their ministers, to explain government policy and its administration and to receive complaints about government activities. Most public servants strive to retain their political neutrality but the line between policy and administration is often difficult to maintain. Thus, not only does the identity of public servants become known to the public but on occasion their personal views on policy issues may be perceived[12].

In Ontario, public servants often appear before select and standing committees of the legislature to answer questions about the administration of their particular ministries[13].

In addition to bearing greater responsibility for the day-to-day operations of government ministries, public servants are also involved in the policy-making process to a much greater extent than the traditional model suggests. Governments now recruit highly skilled individuals who may have greater expertise in a particular field than the minister and members of the legislature. Public servants are expected to be active participants in the policy-making process and to initiate policy proposals, provide expertise, information and analysis. As government policy making becomes more complex, greater reliance must inevitably be placed on the knowledge, information and advice of senior officials[14].

In response to these changes in the practice of government, the traditional doctrine of ministerial responsibility has been reformulated. In a Commission research paper, Professor Kernaghan

expressed the opinion that the convention has now come to mean the following:

1. the minister is answerable to the legislature in that he must explain and defend the actions of his department before the legislature;
2. the minister is answerable to the legislature in that he must resign in the event of serious personal misconduct. He is not usually answerable for the administrative failings of his departmental subordinates in the sense that he must resign;
3. public servants are not directly answerable to the legislature proper but they have become more answerable to legislative committees;
4. the minister usually protects the anonymity of public servants by shielding them from public identification and public censure. Public servants usually protect their own anonymity by refraining from partisan activity or public criticism of government [emphasis in original] [15].

In a similar vein, Maurice Wright has written:

Ministers no longer accept responsibility for all the actions of their civil servants. Ministerial responsibility has come to mean that they are expected to accept responsibility for those matters which they personally, or their civil servants on their instructions have initiated, developed, or carried through. They are no longer expected to accept responsibility for those culpable actions of their civil servants of which they had no prior knowledge and of which they disapprove. Nor are they expected to accept responsibility for those errors or delays of their civil servants which do not involve an important issue of policy[16].

This new formulation of the doctrine, then, has serious implications for its proper functioning as an accountability mechanism. If a minister cannot be held "accountable" in the sense that he cannot be compelled by the legislature to resign in the event of maladministration in his department, and if public servants continue to be constitutionally excluded from direct accountability to the legislature, then there is a breakdown in the system. Ministerial responsibility as it is now defined does not provide a comprehensive system of ensuring responsibility in government:

If ministers do not answer for the administration of their departments, the burden of responsibility either falls on public servants or it is borne by no one. If neither ministers nor public servants can be held responsible for administrative action, a critical gap occurs in government responsibility[17].

In summary, then, the traditional formulation of the convention of individual ministerial responsibility and the related convention of civil service anonymity no longer give an accurate picture of modern conditions. The increased size and complexity of government make it extremely difficult for ministers today to exercise complete control over the departments they head or to become experts in all areas of their jurisdiction. As a result, the civil service has come to play a larger role in both administration and policy making:

There is no doubt, however, that while the focus of responsibility in government continues to be primarily the minister, the locus of actual responsibility lies increasingly in the public service [emphasis in original] [18].

These changes in our system have led to a decline in the anonymity of public servants. More important for present purposes, these changes have led to a reformulation of the doctrine of ministerial responsibility.

When, then, are the implications of the doctrine of individual ministerial responsibility for a freedom of information scheme? First, it is evident that the granting of rights of public access to government information does not undermine the principle that ministers of the Crown are answerable to the legislature for the conduct of departmental matters. On the contrary, greater access to government information would increase the effectiveness of this fundamental constitutional mechanism of political accountability. Indeed, many observers would suggest that the need to breathe renewed life into this instrument of responsible government is the single most important reason for adopting a freedom of information law. Second, freedom of information legislation may have a greater impact on the anonymity of public servants. Under present conditions, the preservation of this tradition of anonymity has come to mean, essentially, that public servants do not expect to be required to disclose or defend advice given to ministers on important issues of public policy, especially in situations where the views of the official differ from the policy ultimately adopted by the government. Though it is true that the appearance of public servants before legislative committees and public meetings to explain government policy occurs with increasing frequency, they are not asked to reveal their own

political preferences or to disclose the advice they have given or will give to their ministers in the course of policy making. The adoption of a freedom of information law that could be used to reveal such matters would mark a significant departure from this well-established tradition. A question to be addressed in fashioning freedom of information proposals is whether this traditional aspect of the relationship between ministers and senior officials should be preserved, or whether it should yield to the rationales for greater public access to government information. We will return to a consideration of this question in subsequent chapters of this report.

#### C. FEDERAL-PROVINCIAL RELATIONS

We have been concerned in this chapter with constitutional traditions relating to the formulation of public policy by parliamentary governments. In the Canadian context, there is a further process of public policy formulation -- federal-provincial negotiations -- to be examined with a view to assessing its implications for freedom of information legislation.

As constituted under the British North America Act of 1867, Canada is a federal state composed of a central government and provincial governments, each with its own constitutionally prescribed powers and responsibilities delineating the character of their interrelationships. As one student of those relationships has observed:

Two central facts characterize the relationship between federal and provincial governments. The first is that they are interdependent: functions and responsibilities are not neatly divided between Ottawa and the provinces. In virtually every important policy field one finds two and often three levels of government deeply involved. Social policy, environmental policy, economic policy, and many others are all shared: effective policy requires joint action. What one government does will affect the ability of the others to achieve their goals. Watertight compartments of sharply defined responsibilities no longer exist, if, indeed, they ever did. The second fact is that governments are in some policy fields autonomous: none can dictate to the others. Each has extensive resources -- political, constitutional and financial -- with which to pursue its own goals and influence others. Hence, in order to achieve coordination and collectively deal with the problems facing Canadians, governments must find ways to resolve conflicts, coordinate their activities and jointly make policy. An elaborate framework of intergovernmental bargaining and negotiation (which has

been described variously as "cooperative federalism," "executive federalism," "administrative federalism," and "federal-provincial diplomacy") has therefore arisen. It has become one of the most important processes, if not the most important process, within which policy is developed in Canada [19].

Whatever label is used to characterize these activities, in this type of federalism "the central and regional legislatures nominally retain their separate jurisdictions over different aspects of the same subject, [yet] there is close contact and discussion between ministers and civil servants of both levels of government so that even changes in legislation are the result of joint decisions" [20]. Professor Donald V. Smiley has described this system of relationships as "executive federalism," which constitutes a significant departure from "'classical federalism' in which each level of government performed the responsibilities assigned to it by the constitution in relative isolation from the other" [21].

The emergence of "executive federalism" reflects the fact that contemporary social, economic and political issues cannot be resolved in isolation but require the cooperation of the various levels of government. Thus, during the last decade, "there have been twenty meetings of the first ministers of the federal and provincial governments and a recent document issued under the name of the Prime Minister [Trudeau] asserts that there are about five hundred 'formal meetings' of federal and provincial officials each year" [22]. In response to these developments, federal-provincial relations have been formalized with the establishment of appropriate institutional machinery. Thus, a variety of committees and conferences exist whose purpose is to facilitate consultation and coordination of policies and programs. The most important of these is the Conference of First Ministers, which involves the premiers and prime minister and their principal advisors. As well, meetings of ministers from each government concerned with a particular policy area are regularly scheduled. Meetings of public servants representing their respective governments, both ad hoc and continuing, occur with great frequency. A Canadian Intergovernmental Conference Secretariat has been established and financed jointly by the federal and provincial governments to provide administrative and support services for meetings of this kind.

Further, federal and provincial governments have established ministries or secretariats to provide advice and analysis and to coordinate the development of bargaining strategies and overall priorities with respect to these negotiations. In Ottawa, a Federal-Provincial Relations Office has been established at the

Cabinet level. Ontario has established a Ministry of Intergovernmental Affairs, and most other provinces have established ministries or departmental units with similar responsibilities.

Agreements reached through these negotiating processes effectively resolve many important policy issues. Indeed, Professor Smiley has observed that "...most of the crucial aspects of public policy are debated and resolved within an intergovernmental context"[23]. Major policy issues are thus negotiated by ministers and senior officials outside any constitutionally prescribed institutional setting, such as a federal-provincial parliament. By tradition, these negotiations are conducted, for the most part, in an atmosphere of confidentiality. Nonetheless, as Professor Smiley has indicated, a considerable amount of information about these processes is made available to the public both by the governments involved and by the Canadian Intergovernmental Conference Secretariat.

In fashioning recommendations for a freedom of information policy, it would appear to be inappropriate to recommend that all material relating to federal-provincial relations remain exempt from the pressures for openness in public affairs. Federal-provincial relations permeate governmental policy-making and administrative activity. There is an obvious and legitimate public interest in access to information concerning the relations between the federal and provincial governments. On the other hand, the implications of requiring that all such materials become part of the public record must be carefully weighed so as to ensure that the effectiveness of these processes is not undermined.

## CHAPTER 5 NOTES

- 1 T.M. Denton, "Ministerial Responsibility: A Contemporary Perspective," in R. Schultz et al., The Canadian Political Process, 3rd ed. (Toronto: Holt, Rinehart, Winston, 1979) 244, cited hereafter as Denton; H.V. Emy, "The Public Service and Political Control: The Problem of Accountability in a Westminster System with Special Reference to the Concept of Ministerial Responsibility," in Royal Commission on Australian Government Administration, Appendix, Volume 1 (Canberra: Australian Government Publishing Service, 1976) 15.
- 2 F.F. Schindeler, Responsible Government in Ontario (Toronto: University of Toronto Press, 1969) 266, cited hereafter as Schindeler.
- 3 Secretary of the Department of the Prime Minister and Cabinet, quoted in Australian Senate Standing Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979) 37, cited hereafter as Senate Report.
- 4 The oath is reproduced in T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: an Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979) 19.
- 5 Schindeler, 267.
- 6 I.W. Jennings, Law and the Constitution, 4th ed. (Cambridge: University Press, 1952) 189-90.
- 7 A.H. Birch, Representative and Responsible Government (London: George Allen & Unwin, 1964) 140.
- 8 Studies in the United Kingdom, Australia, and at the federal level in Canada have found that only a very few ministerial resignations have occurred as a direct result of the operation of this doctrine: see S.E. Finer, "The Individual Responsibility of Ministers," Public Administration 34 (1956) 379, cited hereafter as Finer; Australian Senate Report, 40; 357; see also K. Kernaghan, Freedom of Information and Ministerial Responsibility, (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 2, 1978), cited hereafter as Kernaghan.

- 9 Finer, 393.
- 10 Denton, 347.
- 11 Denton, 356. In recommending the elaborate Cabinet committee structure which has since been adopted at Queen's Park, the Ontario Committee on Government Productivity in its Interim Report Number One (1972), explicitly stated that the purpose of this committee structure was to free ministers from administration in order to concentrate on policy making. See J. Eichmanis, Freedom of Information and the Policy-Making Process in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 13, 1980) 9-21, cited hereafter as Eichmanis.
- 12 Kernaghan, 24.
- 13 Ibid., 18.
- 14 Senior civil servants in Ontario perceive that fifty per cent or more of their responsibilities consist of participating in policy development: H. Rich, "From a Study of Higher Civil Servants in Ontario," Canadian Public Administration 17, No. 2 (Spring, 1974), cited Eichmanis, 34, note 39.
- 15 Kernaghan, 25-26.
- 16 M. Wright, "Ministers and Civil Servants: Relations and Responsibilities," Parliamentary Affairs, 30, No. 3 (Summer, 1977) 294.
- 17 Kernaghan, 26.
- 18 Ibid., 28.
- 19 Richard Simeon, "The Federal-Provincial Decision Making Process," in Ontario Economic Council, Intergovernmental Relations (Toronto: Government of Ontario, 1977) 25, cited hereafter as Simeon.
- 20 J.R. Mallory, "Five Faces of Federalism," in J.P. Meekison, ed., Canadian Federalism: Myth or Reality, 2nd ed. (Toronto: Methuen, 1971) 60-61.
- 21 Donald V. Smiley, Canada in Question: Federalism in the Seventies, 2nd ed. (Toronto: McGraw Hill-Ryerson, 1976) 54.

- 22 The Right Honourable Pierre Elliott Trudeau, A Time for Action: Toward the Renewal of the Canadian Federation (Ottawa: 1978) cited in Donald V. Smiley, The Freedom of Information Issue: A Political Analysis (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 1, 1978) 58.
- 23 Smiley, The Freedom of Information Issue: A Political Analysis, 59.



## CHAPTER 6

# The Experience of Other Jurisdictions

### INTRODUCTION

Freedom of information laws have been enacted in many jurisdictions in North America and Europe. Proposals for such legislation are being actively considered in others. In Australia a freedom of information bill has been introduced by the federal government. A research paper prepared for the Commission by Professor D.C. Rowat provides a comprehensive survey of these developments[1]. This chapter presents a detailed study of the legislation of several jurisdictions in an attempt to develop an understanding of the nature of such schemes. Particular attention is directed to the legislation in force in Sweden and the United States and to the Australian proposals. As well, the existing and proposed legislation at both the federal and provincial levels in Canada will be examined. Developments in Britain will be mentioned briefly.

Sweden was chosen as an area of concentration because public access to government information has been guaranteed by the constitution for over 200 years. The United States is a close neighbour whose practices affect Canadian expectations of government; in addition, the United States has produced, during the fifteen-year history of its Freedom of Information Act (FOIA)[2], an enormous body of scholarly literature and judicial decisions on the issues of public access to information. The U.S. statute was substantially reviewed seven years after its implementation, and many deficiencies in its drafting and problems with its implementation were identified and corrected[3]. An examination of that process may be helpful in devising a freedom of information law that would avoid similar problems in Ontario. Australia has a parliamentary system much like our own[4]. The proposed federal legislation introduced in 1978 was referred to the Senate Standing Committee on Constitutional and Legal Affairs for further study. The committee's recent report examines the issues arising in the design of a freedom of information scheme that will operate successfully in the context of parliamentary government[5].

### A. SWEDEN

All Scandinavian countries have adopted some form of freedom of information legislation. Sweden's is the oldest, having been

in existence in one form or another since 1766. The laws in the Scandinavian countries share many common features: each law is, in effect, derived from the Swedish statutes and practices. Only in Sweden, however, is the right of public access given constitutional protection. The Swedish Freedom of the Press Act is one of three statutes comprising the Swedish Constitution[6]. In the other Scandinavian countries, the access laws have the status of ordinary statutes. The distinction is of functional as well as philosophical importance: it is more difficult to amend a constitutional law than an ordinary statute[7].

Before turning to the main features of the Swedish information access scheme, it may be useful to indicate in general terms the central features of the institutional structure of the government in Sweden. The Swedish system exhibits some similarities to the structure of government in Ontario. There is a unicameral legislature led by a Prime Minister who must enjoy its confidence or resign, and a Cabinet of ministers, each of whom heads a subject area ministry. Parliamentary scrutiny of the conduct of government is effected by members of Parliament in question periods, and by their participation in standing committees, as well as through the parliamentary auditors and an ombudsman.

There are also significant differences between the Swedish and Ontario structures. Seats in the legislature are assigned proportionally; Cabinet ministers, although responsible to the legislature, are not responsible for implementing government programs. Responsibility for program administration is assigned to governmental authorities; these are independent of ministries, but are responsible to the Cabinet as a whole. Further, although the Cabinet is a collegial body, ministers who do not want to take legal or political responsibility for a decision may register their disagreement in the minutes. In practice, however, such disagreements are rarely registered and the expectation is that a minister who could not accept collegial responsibility for Cabinet decisions would resign.

The Freedom of the Press Act guarantees the public right to have access to government information "to further free interchange of opinions and enlightenment." This provision was first enacted in 1765 by the new government because of its frustration over administrative secrecy and press censorship under the previous regime. In Sweden, the open nature of the government is also guaranteed by two other constitutional laws, the Instruments of Government Act and the Riksdag Act. The provisions in the Freedom of the Press Act guarantee public access to government information. The other statutes ensure that there will be an opportunity for public participation in government decision making, particularly in policy-making processes. Section 7(2) of the Instruments

of Government Act requires that a minister seek the advice of interested persons before proposing draft legislation or other measures to the Cabinet. This is the "remiss principle." In practice, this means that background information, including an evaluation of alternatives, is widely circulated to special interest groups as well as to members of the public before the government commits itself to a particular policy option. Although a minister may consult with whom he chooses, the information is by law accessible at the same time to others who are not on the minister's distribution list. Thus, as one commentator has pointed out

...from the standpoint of their participation in formulating legislative policy, there are few countries which even approach Sweden. Virtually every major political force in the country will have an opportunity to express its opinion, often at a very early stage in the process[8].

#### ACCESS TO INFORMATION: THE FREEDOM OF THE PRESS ACT

The Freedom of the Press Act grants a right of access to all individuals, whether citizens or aliens, to "official documents." Official documents are not limited to writings on paper. The concept extends to any kind of stored information, regardless of its physical form. A document only becomes "official" for the purpose of access when it is completed or accepted by an official for the purpose of filing, or when it is sent out or received by a government authority. The definition of "government authority" includes ministries and agencies[9] as well as many state enterprises such as the post office, the state railways and the Swedish National Industries Corporation, but does not include share capital corporations engaged in commerce, even if they are wholly owned by the government.

An applicant has the right to inspect a document or to receive a copy of it. Copying fees may be charged, but no fee may be charged for the time civil servants spend searching for the information or reviewing it to see if it is accessible. The duty to disclose devolves on civil servants personally, and each is subject to censure for failure to respond appropriately to a request. If an applicant's request is denied, he may appeal to the Ombudsman, to the next level in the administrative hierarchy, or to the administrative courts. There is a small fee for launching an appeal to the administrative courts but there is no fee for appealing to the Ombudsman or the next level in the hierarchy. Although the Ombudsman has only the power to recommend release of a document, it is rare that his recommendations are not followed.

If an appeal is taken to the next level in the administrative hierarchy, then the person hearing the appeal has the same personal responsibility for his conduct as the civil servant to whom the request came. Even in a case where a document is marked as being exempt from the Freedom of the Press Act, the marking is considered to be merely an indication that one civil servant thought an exemption was appropriate at the time. Another civil servant, who may later be involved in the question of releasing or withholding the document, must make his own decision. The marking is not in any sense a binding determination of the status of the document.

Appeals to the administrative courts are usually employed only as a last resort, but there is no requirement that administrative remedies be exhausted before filing an appeal. The procedure in administrative courts is very informal[10]. As far as the applicant is concerned, a simple letter setting out the date of the refusal, the name of the civil servant who gave the refusal (all refusals must be signed), and the fact that the applicant is appealing the decision are sufficient to invoke the court's jurisdiction. The administrative court can grant a number of remedies, including an order that the documents be produced. If the applicant wants the documents in order to challenge a government decision which affects him, then the court, upon considering the documents, can overturn that decision, remit the case for further consideration, or order the documents to be shown to the applicant so that he is able to participate in the decision-making process.

#### EXEMPTIONS

The Freedom of the Press Act establishes principles for the drafting of exemptions to the general rule of public access:

The right to have access to official documents may be restricted only if restrictions are necessary considering:

1. the security of the Realm or its relations to a foreign state or an international organization;
2. the central financial policy, the monetary policy or the foreign exchange policy of the Realm;
3. the activities of a public authority for the purpose of inspection, control or other supervision;
4. the interests of prevention or prosecution of crime;
5. the economic interests of the state or the communities;

6. the protection of the personal integrity or the economic conditions of individuals [privacy concerns];
7. the interest of preserving animal or plant species[11].

Restrictions imposed for these reasons must be "scrupulously defined" in the provisions of a "specific act." Provisions implementing these principles are set forth in the Law on the Curtailment of the Right to Demand Official Documents, also known as the Secrecy Act[12].

There are additional exempting provisions scattered throughout the Freedom of the Press Act. Briefly summarized, they are as follows:

- inter-agency communications are exempted if the agencies are not independent of each other;
- documents being held by a governmental authority solely for the purpose of technical processing or storage are exempted;
- recordings that form part of a register of persons which would allow the person to be identified are exempted;
- tender documents or others which are required to be delivered in sealed envelopes do not have to be made available until the date fixed for opening the envelopes;
- preparatory information is exempted, unless it is taken in for the purpose of being filed (such preparatory information includes preliminary outlines for decisions and communications unless they are filed);
- minutes of the Riksdag (parliament) committees, the General Church Assembly, the parliamentary auditor, local authorities or government commissions on a matter dealt with by the authority "solely for the purpose of preparing the matter for decision" are exempted;
- copies of maps, drawings, pictures and recordings do not have to be provided if this would create difficulty for the authorities and if the original documents themselves can be made available where they are kept.

The term "decisions" as used above refers to decisions at each level in the civil service hierarchy, not only those of the head of the agency. Thus, internal decisions, even though they

may be subject to review at the next level or at several additional levels in the hierarchy, are accessible when they are made.

## THE SECRECY ACT

The Secrecy Act is the major statement of what information may be kept secret. Forty-three detailed sections set out the kinds of records and documents which may be withheld; the ways in which secrecy provisions may continue to govern documents through many possible uses; and the length of time for which each document may be withheld. By imposing time limits, the act provides an automatic release system. The time limits vary according to the kind of information protected. Information which might cause an invasion of personal privacy may be protected for up to seventy years; high level policy information (such as national security information) for up to fifty years; more routine matters (such as town plans or investigatory files) for up to twenty years; and cabinet decisions for two to fifty years.

Every time a civil servant receives a request for a document, he must re-evaluate the time limit already placed on the document. The limits are only guidelines. The act further states:

When it is necessary in the interest of the public or individuals, the government may decree the release of documents regardless of what has otherwise been enacted in this Act[13].

Each section in the Secrecy Act is very detailed, yet each contains a statement that nothing may be kept secret if the relevant entity (Cabinet, agency, board) decides otherwise, or if the individual identified in the information gives his consent.

If the relevant entity decides to release information before the expiry of the maximum time limit, it can impose conditions on the recipient. In all cases, the decision maker is to be guided by a harms test: he must consider the possible harm or detriment that might result if information is released[14].

Documents covered by the Secrecy Act include Cabinet records, documents whose disclosure might be damaging to defence or the security of the country; documents concerning legal disputes, legal investigations, inspections, or psychological tests; police, customs or public prosecutors' work (but not including the parliamentary ombudsman); many kinds of personal information; information concerning supervision of banks and financial establishments; information on investigations, supervision or support activities concerning businesses; documents concerning arbitration; tender

information and negotiating information; and competitive information of a government enterprise in competition with other enterprises. In addition, the act contains a long list of detailed examples describing the small differences between each category of information. The more specific the description of exempt documents, the easier it is for officials to decide what information can be released; this lengthy enumeration reflects Sweden's 200 years of experience with access and secrecy provisions.

The Freedom of the Press Act and the Secrecy Act operate in such a way that the need for confidentiality and openness is constantly re-examined. Each official to whom a request is properly directed is personally responsible for his own decision; he must be able to justify his refusal to disclose if there is an appeal to a court or to the Ombudsman. On the other hand, if he releases information contrary to law, a penalty can be imposed[15].

#### B. THE UNITED STATES

Although the general institutional structure of the government of the United States will be well known to most, if not all, readers of this report, it may be useful to begin a discussion of American freedom of information laws by briefly indicating the essential differences between the U.S. system and the parliamentary system of government. The United States is a constitutional, federal republic with a bicameral legislature. The constitution divides legislative power between the states and the federal government. The U.S. constitution provides that certain fundamental rights and freedoms cannot be violated by the federal or state legislatures. The constitutionally entrenched Bill of Rights is merely one manifestation of the central feature distinguishing the republican system from the parliamentary system -- a division of powers among the three branches of government: the executive, the legislative, and the judicial. The President, the Cabinet and governmental agencies are the executive branch of government, the Congress is the legislative branch, and the courts are the judicial branch. Each branch is assigned separate powers under the constitution. In order to ensure that an undue concentration of power does not reside in any of these branches, a series of constitutional mechanisms was devised to enable each branch to exert some control over the others. These "checks and balances" are reflected in the way members of each branch are chosen and in the blending of substantive and "oversight" or supervisory powers assigned to each branch. For example, presidential appointments of Cabinet members, heads of agencies and members of the judicial branch must be confirmed by the legislative branch; the executive branch can veto a legislative measure; the judicial branch can overrule the actions of either of the

other two branches if it is found that their actions are unconstitutional. Although each branch checks and balances the others, the legislative branch remains paramount. It can override the President's veto and can impeach any agency head, any Supreme Court judge, or the President.

Of particular interest in the context of the freedom of information issue is the relationship between the executive branch, to which the Freedom of Information Act applies, and the legislative branch, to which it does not.

The legislative branch (Congress) consists of the House of Representatives and the Senate. Both houses are of equal status; the Senate does not function as an upper house. Accordingly, legislative measures can be introduced into either chamber by any of its members. The President cannot introduce legislation; indeed, the President is forbidden to appear in either chamber without an invitation. Measures originating with the President are introduced by a like-minded senator or representative. Both the Senate and the House have elaborate committee structures. There are essentially two kinds of responsibilities assumed by committees: they are assigned specific subject areas within which to evaluate possible future laws and policies, and they are assigned supervisory responsibilities with respect to the performance of federal agencies involved in the administration or implementation of a law, policy, or government program. In exercising their policy-making and supervisory functions, committees frequently hold public hearings. These often involve vigorous cross-examinations of federal agency officials with respect to the operations and budgeting of the agency's programs.

At present, there are twenty-two standing committees in the House and fifteen in the Senate. Each committee has its own professional staff of not more than eighteen people. Each committee is chaired by a member who, since 1975, has been elected from nominations made by the majority party's caucus. As well as the professional staffs attached to each committee, there are four organizations to which Congress can turn for information and analysis of matters on the congressional agenda -- the Congressional Research Service, the General Accounting Office, the Office of Science and Technology Assessment, and the Office of Management and the Budget. Each of these organizations prepares research studies, and these studies are routinely made available to the public.

The executive branch is headed by the President and consists of the Office of the President, federal departments or agencies, and various advisory committees. Each department or agency has a statutory mandate or jurisdiction with respect to certain subject

areas. Each is responsible for implementing and administering programs, as well as for making policy recommendations to the President. Speaking generally (and ignoring differences in constitutional lines of authority), federal "departments" are comparable in function to the ministries of parliamentary governments. Federal "agencies," such as the Securities and Exchange Commission and the Federal Communications Commission, are roughly equivalent to boards and commissions established for similar purposes by parliamentary governments in Canada.

Departments or agencies are often granted powers in their enabling statutes that are essentially legislative in nature, permitting them to promulgate rules in the course of implementing their administrative responsibilities. Typically, these powers can be exercised without the approval of either Congress or the President. Departments and agencies engaging in these "rule-making" exercises are required by statute to follow certain procedures aimed at facilitating public comment and criticism of proposed rules before they are adopted[16]. The practice is to publish a notice of proposed rules in the Federal Register and invite comment from interested parties. After reaching a decision on the matter, the adopted version of the agency's rule is published in the Federal Register. If the agency is headed by a collegial body (and most important agencies, as opposed to departments, are) then its deliberative sessions must be open to the public under the Government in the Sunshine Act[17].

Advisory committees, on the other hand, do not make policy; they are established for the purpose of offering advice. The Federal Advisory Committee Act[18] requires almost all meetings of advisory committees to be open to the public, and subjects agency records to the provisions of the Freedom of Information Act.

As mentioned above, the President appoints the heads of government departments and agencies, subject to congressional approval. It is from these individuals, for the most part, that the President selects those who will form a Cabinet. The Cabinet may also include individuals who are not heads of agencies but who are special advisors on various subjects. Cabinet members are not drawn from the House or Senate. Thus, there is no constitutional equivalent of the parliamentary doctrine of ministerial responsibility to the elected members of the legislature. It would be wrong to conclude, however, that the executive is not accountable for its actions to Congress. Members of Cabinet and agency personnel frequently testify before congressional committees for the purpose of justifying and defending actions taken by the executive branch of government. Indeed, the somewhat adversarial relationship between Congress and the executive branch arising from the constitutional checks-and-balances mechanisms facilitates and

encourages exacting scrutiny of executive action by the legislative branch.

#### THE FREEDOM OF INFORMATION ACT

Until the Freedom of Information Act was enacted, limited recognition of the public right to government records was embodied in the Administrative Procedure Act of 1946[19]. That act established a right of access to government records to persons who could demonstrate that they had a "proper and direct concern" with the information. However, an agency could refuse to disclose information even to "concerned persons" if the "public interest required secrecy" or if the records were held confidential "for good cause found." Very little information was disclosed under this statute. Congressional debate on the desirability of amending these provisions of the Administrative Procedure Act occurred intermittently until the Freedom of Information Act was passed in 1966. The act came into effect on July 4, 1967. Congressional hearings on the act's operation were held in 1973, and led to amendments in 1974. The act was further amended in 1976.

The Freedom of Information Act adopts as its basic principle the proposition that members of the public are entitled to see and make copies of government records. "Any person" may request access to government records under the act. Certain records are exempt from disclosure pursuant to exempting provisions (to be considered below in some detail). A request for access is to be made to the agency which holds the record. "Agency" is very broadly defined in terms derived from the general provisions of the Administrative Procedure Act and includes any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government including the Executive Office of the President or any independent regulatory agency"[20]. The term "records" is not defined in the statute, but it has been interpreted broadly in a number of cases to include all documents in the possession of an agency or subject to its substantial control or use[21]. On the other hand, handwritten notes prepared by staff members for their own use and not circulated to others are not "records"[22].

A refusal to provide the records within a ten-day time limit can be reviewed on appeal, first to a higher level in the agency[23] and then to the District Court. If the agency makes no response to a request within thirty days, it is deemed to have refused access[24]. The courts are empowered to reverse agency decisions and order the release of documents.

An applicant may be required to pay for the searching and reviewing time as well as for the direct copying charges. Fees are determined by agency regulations published in the Federal Register. An agency is always permitted to waive fees, and must waive or reduce fees when it is "in the public interest because furnishing the information can be considered as primarily benefitting the public"[25].

The act attempts to ensure that the public will have ready access to information showing how to make a request and to which agency it should be addressed. Each agency must publish in the Federal Register a description of its organization, including a list of places and the methods the public may use to obtain information, statements of how the agency's functions are "channelled and determined"[26], rules of procedure, descriptions of forms, and instructions concerning the scope and content of papers, reports and examinations.

The act further requires that agencies must publish the internal directives and guidelines used to instruct agency personnel in how to exercise statutory decision-making powers. The statute requires that "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" be published in the Federal Register[27]. No one can be adversely affected by the application of such rules or policies unless they have been published in accordance with the law or unless he has had actual and timely notice of them. Final opinions, orders, statements of policy, interpretations, administrative staff manuals and instructions to staff affecting a member of the public must also either be published or made available for public inspection. Indexes of this type of material created after July 4, 1967 must be prepared and made available at a cost not to exceed the cost of duplication. The use of so-called "secret law" within the agencies is a thing of the past.

The statute imposes duties upon agencies rather than conferring rights upon individuals. For example, instead of stating that any person may demand access to records, it provides that "each agency, upon any request for records which (a) reasonably describes such records and (b) is made in accordance with published rules...of procedure, shall make the records promptly available to any person"[28].

Under the former Administrative Procedure Act, the requirement that applicants clearly identify records was often abused by agencies; they refused to look for a record unless the applicant provided the file number and exact location. In the absence of indexes and other helpful material, it was rare that an applicant

could do so. Under the Freedom of Information Act, the phrase "reasonably describes" is usually interpreted in accordance with the House Report, which states that a description "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." The task of "reasonably identifying" records is made much easier by the publication requirements imposed on agencies by the act[29].

There are nine exemptions to the general principle of public access set out in the Freedom of Information Act. Most of these exemptions have been subject to extensive judicial interpretation and some, notably the exemptions relating to deliberative materials and commercial information, have in effect been redefined by the case law[30].

All of the exemptions are permissive in the sense that the act does not require agencies to withhold exempt information. Although most of the exemptions are drafted so as to exclude from access certain kinds of records or information[31], the exemptions relating to privacy and law enforcement are drafted in terms of injury tests; that is, the records can only be withheld if a specified harm would result from the disclosure. However, an injury test has been added in practice to all the exemptions by an interpretative memorandum from the Attorney General, which states that notwithstanding their terms, the exemptions should only be invoked if releasing information would result in a real harm to the public interest[32]. Moreover, the memorandum sets out the Department of Justice's new policy of refusing to defend agencies in freedom of information litigation unless the agency follows the memorandum's instructions.

The statute requires that information which is "reasonably segregable" from information covered by an exemption must be severed from the exempt information and made available in response to a request.

#### Exemption (b)(1): National Defence and Foreign Policy

The first exemption protects records concerning national defence or foreign policy that have been properly classified as "secret" pursuant to an executive order[33]. The exemption thus incorporates the concept of executive privilege as it relates to state secrets[34]. The doctrine of executive privilege allows the President, as head of state, to protect information where disclosure might be injurious to military or foreign affairs[35].

The exemption was amended in 1974 to overrule the decision in EPA v. Mink, which held that a court could not question whether records have been properly classified. If the head of an agency certified that a record was classified and concerned national defence or foreign policy, the court was bound to refuse access. Now the courts are empowered to examine the document in camera and reach an independent decision as to whether the material in question has in fact been properly classified in accordance with the terms of the classification scheme.

#### Exemption (b)(2): Internal Personnel Rules and Practice

The purpose of the second exemption is to relieve agencies of the burden of assembling and disclosing information of minimal public interest. A narrow interpretation of the exemption was suggested in the Senate Report on the bill, which noted that "examples may be rules as to personnel's use of parking facilities, regulation of lunch hours, statements of policy as to sick leave and the like"[36]. The Senate Report interpretation has been adopted by a number of courts, which have distinguished between trivial matters and more substantial ones of public interest[37]. Information relating to the latter must be made available unless disclosure will create a risk that the rules will be circumvented[38].

Some controversy has attended the question of exempting investigative manuals under this exemption. The House Report[39] had suggested that "operating rules, guidelines and manuals of procedure for government investigators or examiners" would be exempt. On the other hand, as we have indicated, the statute requires that administrative staff manuals and instructions to staff that affect members of the public must be made available. There is thus some potential for conflict between the statutory provisions to make internal law public and the House view that investigative manuals could be withheld under exemption 2. The courts have generally held that the test for exempting this kind of material must be whether the "sole effect of disclosure would enable law violators to escape detection"[40]. In practice, cases concerning investigative manuals are the only (b)(2) cases won by the government. Information concerning investigative techniques and prosecutorial tolerances, negotiation or litigation strategies[41], audit procedures[42] and manuals for training customs agents in surveillance techniques[43] has been withheld under this exemption.

#### Exemption (b)(3): Other Statutes

The 1966 version of the third exemption excluded information "specifically exempted from disclosure by statute." Although this exemption was not amended in 1974, a 1975 Supreme Court ruling in Administrator, Federal Aviation Authority v. Robertson[44] led to a reconsideration of the exemption by Congress and a subsequent amendment limiting the scope of the exemption to certain kinds of statutory provisions. The Robertson case held that the exemption extended to material protected under a provision of the Federal Aviation Act[45] which allowed the administrator to refuse to disclose records if, in his judgment, the submitter of the information would be adversely affected and if, again in his judgment, the public interest did not require the release.

In order to overrule this decision, Congress added two limitations to the exemption in 1976[46]. The exemption now applies only if the statute containing the confidentiality provision either (a) requires that the matter be withheld from the public in such a manner as to leave no discretion, or (b) establishes particular criteria for withholding or refers to particular types of matter to be withheld.

#### Exemption (b)(4): Trade Secrets and Commercial Information

The Freedom of Information Act does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In essence, this exemption protects commercially valuable information supplied to government agencies by outsiders.

The definition of "trade secret" generally applied in interpreting this exemption is "an unpatented, secret, commercially valuable plan, appliance, formula, or process which is used for the making, preparing, compounding, treating or processing of articles or matters which are trade commodities"[47].

Information that is not a "trade secret" may still be exempt if it is "commercial or financial," "privileged or confidential," and "obtained from a person." (This last requirement has the effect of denying exempt status to commercial information created by government agencies[48].)

The requirement that the information be "commercial information" has been broadly construed to include information relating to the business affairs of a person or corporation. The requirement that the information be confidential has been interpreted restrictively by the courts as a basis for reading a harms test

into the exemption. Thus, only if the disclosure is likely either (1) to impair the government's ability to obtain similarly detailed data in the future, or (2) to cause significant harm to the competitive position of the person who supplied the information, will the information be exempt[49]. Further, with respect to the first alternative, if the information has been supplied under a statutory duty to provide information to the government, it cannot be said that the government's ability to get similar information in the future is impaired by release[50].

#### **"Reverse" Freedom of Information Litigation**

Persons who have submitted commercially valuable information to the government may, for obvious reasons, wish to be consulted before an agency discloses it to a third party. Although agencies have adopted the practice of engaging in such consultations, the act does not require them to do so. Notwithstanding the absence of specific provisions in the act relating to this problem, submitters of information have, on occasion, sued to enjoin government agencies from releasing information concerning them. These actions are known as "reverse" freedom of information suits[51].

Although some federal courts had granted injunctions forbidding disclosure in such cases, the recent decision of the U.S. Supreme Court in Chrysler v. Brown[52] has disapproved. The court held that the Freedom of Information Act did not authorize reverse suits either explicitly or implicitly and that courts therefore had no jurisdiction to entertain them. The judgment does not preclude the bringing of actions based on other causes of action, such as a suit to enjoin release on the basis that disclosure would constitute an "abuse of discretion" within the terms of the Administrative Procedure Act.

#### **Exemption (b)(5): Inter- and Intra-Agency Memoranda**

The fifth exemption to the act is designed to preserve confidentiality with respect to the deliberative or decision-making processes of government agencies by exempting materials containing advice and recommendations prepared by public servants. The exemption does this in an indirect way, however, by incorporating the government's common-law privileges with respect to discovery of government documents in litigation. The exemption includes:

Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

In order to determine the scope of this exemption, then, reference must be made to the common-law rules enabling government agencies to refuse to produce documents in the context of lawsuits. Two traditional elements of these rules have been clearly recognized as forming a part of the (b)(5) exemption. First, both attorney-work product privileges and attorney-client privileges have been included in the exemption[53]. Thus, materials prepared for purposes of participating in a lawsuit are exempt. Second, materials which would be recognized on the basis of the doctrine of executive privilege to the extent that the privilege is claimed in order to encourage "open, frank discussions on policy matters between subordinates and chief," and to protect the quality of agency decision making are recognized as exempt under this provision[54]. Beyond this, resort must be made to a number of distinctions which have been articulated in the case law interpreting the (b)(5) exemption in order to determine its scope.

First, it has been decided by the courts that inasmuch as the exemption is designed to protect the deliberative processes, protection for purely factual material is not warranted. The distinction was expressed in EPA v. Mink as being between "material reflecting the deliberative or policy-making process on the one hand and purely factual, investigative matters on the other"[55]. Purely factual material may be protected if, for example, the choice of facts or the way in which they are summarized reflect the nature of advice being given in a deliberative process [56]. Obviously, the distinction between facts and opinions will not always be easily drawn. Documents containing what might be described as "investigation," "evaluation" or "analysis" will contain both kinds of material. In Vaughn v. Rosen (II) [57], the court ruled that "factual investigative or evaluative portions" of documents which "reflect final objective analyses of agency performance under existing policy" and which "reveal whether the agency's policy is being carried out" must be disclosed. In all cases, the government must prove that there is a genuine deliberative process and that it falls within exemption (b)(5).

While options are being discussed, the opinion portion of the documents created is protected by the exemption. The rationale for exempting advice and opinions was explained in Ackerly v. Ley[58] in the following terms:

Congress intended that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.... In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and

listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

Second, a distinction is drawn between the discussions leading up to a decision and the decision itself. Deliberative processes ultimately lead to a decision, albeit in some cases a decision to do nothing. Opinions exchanged in the course of reaching a decision are exempt. Once a final decision has been made, however, the decision itself is normally accessible under the act even if it has not yet been announced[59].

A third distinction has been drawn between pre-decisional and post-decisional documents. Just as a decision becomes accessible once made, so too do documents created after the decision explaining or discussing the decision[60]. Pre-decisional documents do not, however, become accessible simply because the decision has been made. Although the factual portions of such documents are accessible[61], the portions containing opinions and advice remain exempt; it is thought that routinely disclosing such material might inhibit the flow of candid advice and ideas in subsequent decision-making processes.

A fourth judicial gloss on the exemption is that otherwise exempt material incorporated by reference in a decision, or otherwise adopted as the explanation for a decision, is not exempt. If the decision "expressly"[62] adopts or relies on information contained in a pre-decisional document or another document which would otherwise have been exempt under (b)(5), such as a staff memorandum[63], the document loses its protection and must be made accessible[64]. So too, otherwise exempt documents must be made available if they are subsequently used as a justification for the decision[65].

A fifth limit on the exemption is that it will not protect statements of policy adopted by the agency or instructions to staff that affect a member of the public[66]. As we have indicated above, material of this kind must either be published in the Federal Register or indexed and made available to the public.

Finally, a number of cases have distinguished between different kinds of opinions, and have held that opinions of experts must, as a general rule, be made accessible. In Tennessean Newspapers v. Federal Housing Administration[67] the court held that the "finished work product of a professional" was not part of a deliberative process but was an analysis of the facts involving a professional opinion. The document, which contained the report of a real estate appraiser, was ordered released. So too, expert scientific opinions have been ordered released[68] as have

"inferences based on facts observed by an expert where the inferences depend on the expert's expertise"[69].

The cumulative effect of these various judicial interpretations of the (b)(5) exemption is narrowly to confine the exemption to the policy advice of public servants which, if disclosed, would harm the deliberative processes of an agency.

#### Exemption (b)(6): Clearly Unwarranted Invasion of Privacy

Exemption (6) is designed to protect personal privacy, but only to the extent that disclosure would result in a "clearly unwarranted" invasion of privacy. Although the exemption is expressed in its terms to apply only to "personnel and medical files and similar files," it has been broadly construed to apply to all files containing sensitive personal information. In one case, it was held that

under normal circumstances, intimate family relations, personal health, religious and philosophic beliefs, and matters that would prove personally embarrassing to an individual of normal sensibilities should not be disclosed[70].

#### Exemption (b)(7): Law Enforcement

Exemption (7), the law enforcement exemption, has been the subject of much controversy. While the 1966 wording of the exemption ("investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency") clearly recognized that there was both an interest in preserving these records from public scrutiny and an interest in making some kinds of law enforcement information available to the public, judicial interpretations tended to favour a broad construction of the exemption. Critics maintained that the withholding of virtually any file labelled "investigatory" by law enforcement authorities could be effected under the provision[71].

In 1974, amendments were introduced for the purpose of clarifying the meaning of the exemption and limiting its scope. The provision now reads as follows:

...investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would

- (a) interfere with enforcement proceedings,

- (b) deprive a person of a right to a fair trial or an impartial adjudication,
- (c) constitute an unwarranted invasion of personal privacy,
- (d) disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,
- (e) disclose investigative techniques and procedures, or
- (f) endanger the life or physical safety of law enforcement personnel.

One of the important changes made to the provision was to substitute the phrase "investigatory records" for "investigatory files." The fact that information was contained in an investigatory "file" is no longer dispositive of the status of the information. An attempt must be made to segregate non-exempt records from those protected by the exemption.

If the exemption is to apply, it must first be determined that the records are "investigatory" and "compiled for law enforcement purposes." It is accepted that the latter phrase extends not only to criminal law enforcement matters but to civil and regulatory matters as well. However, information gathered in the course of routine inspections or audits in regulatory matters does not come within the exemption, nor do investigations whose purpose relates to policy formulation rather than enforcement of the law against particular individuals[72]. To constitute a law enforcement matter, there must either be a serious prospect of prosecutorial or adjudicative proceedings of some kind or a past investigation for such purposes with respect to which confidentiality is still necessary[73].

Once it has been determined that the records constitute investigatory records compiled for law enforcement purposes, a further determination must be made that the disclosure of records would result in one of the six enumerated injuries set out in (b)(7). The first of these, "interference with enforcement proceedings," extends not only to disclosures that would impair the ability of the prosecution to present its case at trial, but to disclosures that would interfere with an investigation by alerting the subject. The second injury test, interference with "fair trial or an impartial adjudication," is evidently designed

to protect the interests of persons who are the subjects of investigations or proceedings. Its primary object is to avoid prejudicial pre-trial publicity or other impairment of the ability of the person fairly to present his case in an adversarial proceeding.

The third test relating to the protection of personal privacy limits requests in two ways. First, third parties seeking information about an individual who is the subject of an investigation may be denied access on the basis that this would involve an unwarranted invasion of the privacy of the individual being investigated. Second, where the subject of an investigation himself seeks access to the investigatory file, access to information in the file concerning other individuals may be denied on this basis.

Specific reference to privacy protection appears to be redundant in light of the more general exemption for privacy in (b)(6). Even though (b)(7) omits the word "clearly," a different, less onerous test for (b)(7) withholding has not evolved in the case law. There has been no difference in the interpretation of the two exemptions.

The U.S. case law concerning the unwarranted invasion of privacy test will be discussed further in Chapter 14 of this report in the context of a detailed discussion of the problems involved in drafting an exemption for the purpose of protecting personal privacy.

The identity of informants is protected under the fourth test, although a distinction is drawn between the extent of the exemption in criminal or security matters as opposed to civil or regulatory matters. With respect to the latter, records will be exempt only to the extent that disclosure would reveal the identity of a confidential source. With respect to the former, however, the exemption protects not only information which if disclosed would reveal the identity of the informant but also all information supplied by that confidential source, provided that it has not been made available from other sources as well. With respect to criminal law enforcement and security investigations, then, law enforcement authorities can assure informants that information supplied by them will not be made accessible under the act.

The fifth test relating to investigative techniques is obviously intended to afford protection to materials that would, if disclosed, increase the ability of violators of the law to avoid detection. The exemption does not extend, however, to routine law enforcement techniques, the nature of which is widely

known to the public, such as fingerprinting or ballistics tests[74]. The final test relating to the safety of law enforcement personnel serves an obvious and important purpose and has not been the subject of much comment or litigation.

Exemption (b)(8): Reports Prepared in the Course of Regulating or Supervising Financial Institutions

The eighth exemption contained in the Freedom of Information Act protects information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation and supervision of financial institutions." The exemption was described by the Senate Committee as being "directed specifically to ensuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation and supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies"[75]. The concern underlying the exemption is that the disclosure of federal bank inspectors' reports might cause a "run" on a bank. Critics of the provision suggest that it is unnecessary inasmuch as the security of such institutions is ensured, for these purposes, by regulatory measures relating to the maintenance of adequate reserves and proper banking practices. The underlying rationale of the provision has been referred to as a basis for construing the provision narrowly to records relating to the supervision of banking institutions. It has been held that the exemption does not protect records relating to other financial institutions such as stock exchanges or brokerage houses[76].

Exemption (b)(9): Geological and Geophysical Information

The ninth exemption protects "geological and geophysical information and data, including maps, concerning wells." Although the need for confidentiality with respect to information of this kind is evident, it is generally agreed that the exemption is superfluous inasmuch as commercially valuable information of this kind would be covered by the commercial information exemption. The origin of the exemption has been explained by one commentator as being "added at the apparent request of the Western Oil and Gas Association to serve what one journalist called a 'Texas touch' in the rearguard action against the FOIA bill"[77].

## OTHER PROVISIONS

In addition to revising the act with respect to tightening of procedural requirements and clarifying and limiting a number of the exemptions, Congress added provisions in 1974 with the specific objective of encouraging recalcitrant agency personnel to comply more fully with the spirit of the legislation. Congressional committee hearings had produced evidence that the occurrence of wilful non-compliance with the statute was a sufficiently widespread problem to require some remedial action. Accordingly, a provision was added[78] to permit courts engaged in reviewing agency responses to requests to recommend the initiation of disciplinary action with respect to a particular officer or employee. The court may issue a written finding that "the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." In such cases, the Civil Service Commission must promptly initiate disciplinary proceedings with respect to the public servant primarily responsible for the withholding. The commission's ultimate recommendation must be implemented by the agency in question.

Finally, mention should be made of the extensive reporting requirements imposed on agencies by the 1974 amendments to the act. After the 1972 congressional hearings relating to the implementation of the act, the House Committee on government operations reported that a number of federal agencies had not provided information sufficient for proper evaluation of their performance[79]. The 1974 amendments contain the following provision:

- (d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include --
  - (1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
  - (2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;
  - (3) the names and titles or positions of each person responsible for the denial of records requested

under this section, and the number of instances of participation for each;

- (4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;
- (5) a copy of every rule made by such agency regarding this section;
- (6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and
- (7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees and penalties assessed under subsections (a)(4)(E), (F) and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

According to the Senate Report, the amendment was intended "...to identify recalcitrant agencies, recurring misrepresentation of the mandates of the FOIA, and undue delays..." and reflected the view that individual public servants should be subject to public evaluation of their performance under the act[80].

#### ESTIMATED COSTS OF THE U.S. FREEDOM OF INFORMATION ACT (FOIA)

There is little reliable information on the costs of the U.S. act. The congressional reports which accompanied its passage in 1966 contain no reference to costs; it was generally expected that agencies would absorb the costs of implementing the FOIA in their annual operating budgets. The amending provisions added to the act in 1974 requiring agencies to report annually to Congress on their implementation of the act contain no provision requiring that costs be calculated and reported. It appears that Congress

did not regard the potential costs of the FOIA as an important factor when weighed against the benefits it was hoped the act would provide.

However, after the 1974 amendments were passed, Congress began to distribute an annual questionnaire to agencies requesting a statement of "incremental costs" incurred in administering the amendments. The most recent figures available from this questionnaire indicate a total annual cost of \$25,953,317[81]. Approximately 65 per cent of these costs were attributable to four agencies: the Department of Defence, the CIA, the Department of the Treasury and the Department of Health, Education and Welfare.

U.S. observers suggest that the estimated annual figure is probably inaccurate, although it is difficult to know whether the figure is too high or too low. In the first place, the survey results suffer from incompleteness. Not all agencies answer the questionnaire. Second, many of those agencies that did report used different cost bases and interpreted "incremental costs" in different ways. Thus, some agencies reported all administrative costs for FOIA operations during the year as incremental costs; others combined these figures with cost totals from the previous year. Finally, there is continuing ambiguity as to what constitutes an FOIA request for cost accounting purposes. Some agencies have substantially inflated their figures by including all requests for information as FOIA requests even though the information would have been made available without the FOIA.

In short, it is impossible to give an accurate figure of the actual operating costs of the American act. As Professor Davis has written, "What are the costs? The best answer is that no one knows"[82]. However, even if the figure mentioned above of \$25,953,317 is taken as a rough estimate, it can be put in perspective by comparison with the overall public information costs of the United States federal government. Although estimates with respect to this figure are also speculative[83], it appears that FOIA costs do not represent more than 2 to 3 per cent of the federal government's expenditures on public information programs.

As we have already indicated, two additional statutes play an important role in ensuring open government in the United States. The Government in the Sunshine Act[84] and the Federal Advisory Committee Act[85] require certain government entities to hold their meetings in open session to allow members of the public to attend and observe their deliberations.

## THE GOVERNMENT IN THE SUNSHINE ACT

Brief reference has already been made to the existence of federal agencies responsible for regulation and policy making in certain specific areas of national concern[86]. These independent regulatory agencies are typically headed by two or more individuals who are appointed by the President (with the advice and consent of the Senate); they form part of the executive branch. Agency heads are not members of either the Senate or the House of Representatives. Although they are accountable directly to the President, and subject to scrutiny by congressional committees, their mandates usually include the power to engage in those policy formulation and decision-making processes expected to be exercised in an independent fashion, immune from intervention either by Congress or by the President. There is no equivalent of the formal structure of accountability through the executive to the legislature which is a feature of the parliamentary system. In passing the Government in the Sunshine Act, Congress intended to impose a measure of direct public accountability on these agencies by requiring that their meetings be held in open session. Prior to the passage of this legislation

...accountability of the members of these multimember groups [was] made difficult by the isolation of the decision makers from those affected. Except by leaks and published opinions [when required by law]...the closed meetings of multimember agencies [were] unpoliced by the public and unaccounted for except through the indirect potential for judicial reversal of actions or congressional committee attacks on adopted policies[87].

In essence, the act obliges an agency to give the public adequate advance notice of its intention to hold a meeting, the time and location of the meeting, and an outline of the matters to be discussed[88]. In addition, the agency must make the minutes or transcripts of the proceedings available to the public.

There are ten exemptions to the general requirement that all meetings be conducted in public. The first seven are taken directly from the FOIA. A meeting may be closed if the discussions are likely to disclose information which:

1. is authorized by an executive order to be kept secret in the interest of national defence or foreign policy;
2. relates solely to the internal personnel rules or practices of an agency;
3. is specifically exempted by other statutes;

4. would reveal trade secrets, or commercial and financial information;
5. if revealed, would constitute a clearly unwarranted invasion of personal privacy;
6. would disclose law enforcement records;
7. relates to the regulation of financial institutions.

In addition, meetings may be closed if they will involve agency deliberations on whether to accuse an individual or corporation of a crime or to formally censure someone, or if they specifically concern the agency's plans to participate in, conduct or terminate an adjudicatory proceeding. Finally, an agency may close its meetings in order to discuss a particular plan or course of action if holding the meeting in public would frustrate the proposed action.

If an agency wishes to hold a closed meeting, it must first, in consultation with legal counsel, decide whether one of the statutory exemptions applies. If there is an applicable exemption, the members must then vote on whether or not to close the meeting. Even if it is decided by a majority to close the meeting, the agency must give public notice of the time and place of the meeting, and provide a statement of the reasons for holding the closed session and a list of all non-members including staff and outsiders who will be attending the meeting. Transcripts of the proceedings held in closed session must be kept, and non-exempt portions must be made available to the public.

The act permits a member of the public to apply to the courts for an injunction to prevent the closing of a meeting. The court has power to conduct an expedited hearing and to order that the meeting not be held until the dispute over closing is resolved. Thus, the provisions of the act are enforceable by interested members of the public. In addition, the general operation of the act is overseen by the House and Senate Government Operations Committee, who can bring any abuses to the attention of the public through congressional hearings and investigations.

#### THE FEDERAL ADVISORY COMMITTEE ACT

The Federal Advisory Committee Act, passed in 1972, imposes similar open meeting obligations on advisory committees. These are defined as groups appointed by an agency or by the President solely to provide advice and recommendations. Their members are usually drawn from outside the government. The assumption

underlying the act is that open deliberations will reduce the risk of agencies being unduly influenced by the advice of one or more special interest groups. The act allows the press and interested members of the public to act as watchdogs over the advisory process. Under the act, each advisory committee must be chartered to a specific government agency and the charters filed with the standing committees of the House and Senate. These operating charters automatically expire after two years unless they are renewed by the agency. The circumstances under which advisory committee meetings can be closed are identical to those in the Government in the Sunshine Act, and public access to documents generated by these committees is governed by the Freedom of Information Act.

#### C. U.S. STATE LEGISLATION[89]

Of the fifty states in the United States, forty-eight have freedom of information laws. Only Mississippi and Rhode Island are without such legislation, although county chancery court records in Mississippi and local council records in Rhode Island have been opened for public inspection. In addition to legislation providing a legally enforceable right to inspect and copy public records, the majority of states have laws requiring state and local government bodies and other groups supported wholly or partly by public money to hold their meetings in public session, subject to certain specific exemptions.

Almost all states permit "any person" to request access to government records, regardless of state residency status. In most states, courts have adopted rules of broad construction of access rights and narrow construction of withholding exemptions. The number of state laws restricting access by defining "public records" very narrowly is declining. The broad definition of public records in the California statute is representative; it provides a right of access to

any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of its physical form or characteristics[90].

The exemptions in the majority of state laws are similar to those in the federal act. (In many cases, in addition to providing an exemption for records where disclosure would be an invasion of privacy, specific privacy protection statutes have also been adopted. A brief outline of these statutes appears in Volume 3 of this report.) Some states require that persons with a direct interest in the records requested by a third party be given

notice of the request and an opportunity to present reasons why the records should not be disclosed.

A large number of state freedom of information laws lack a mechanism for enforcing access rights. Therefore, a requester may have to resort to common-law remedies of mandamus or a declaratory judgment if the statute does not provide for internal or judicial review of an agency's decision to refuse access. In most states, an onus is expressly imposed on the government to demonstrate why the record in question should not be disclosed. Several state laws have provisions similar to the federal Freedom of Information Act requiring indexing of administrative decisions and orders to facilitate public access; an implied obligation to index has been imposed by the courts in other states.

The New York state freedom of information law which was adopted in 1977 as an amendment to its Public Officers Law[91] is typical of the more advanced state laws. The preamble to the law makes the following declaration of legislative intent:

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality[92].

Under the New York law, public officials must respond to a request for information within five days of its receipt; a denial of the request can be appealed to the head of the governmental institution in question, with a further appeal to the courts. The exemptions are similar to the federal act, although the New York law expressly permits access to statistical or factual data contained in inter- or intra-agency materials. Like the federal act, the New York statute requires that internal agency law or policy statements and instructions to staff affecting a member of the public also be disclosed.

In addition, New York has established a committee on public access consisting of four state officials and six other non-governmental persons, four to be appointed by the governor (at least two of whom must be representatives of the media) and one each appointed by the president of the Senate and the speaker of the Assembly. This committee is responsible for overseeing the operation of the act and for providing rules and guidelines to

state and local agencies covered by the act. The committee must report annually to the governor and to the legislature.

Thus, freedom of information legislation at the state level in the United States is the rule rather than the exception, and while specific provisions may vary from state to state, the principle that the public should have a legally enforceable right to inspect government records is now well-established.

#### D. AUSTRALIA

Like Canada, Australia is a federal constitutional monarchy and derives many of its constitutional practices and traditions from Britain, although in Australia both houses of Parliament are elected. The Cabinet, which may be composed of members of the House and members of the Senate, is subject to the conventions of Cabinet solidarity and ministerial responsibility. The administration of government is structured much as it is in Canada. Ministers head departments of state. They are served by a deputy minister or permanent head, and by civil servants in a hierarchical structure. The civil service is, by tradition, politically neutral and relatively anonymous.

In 1974, the new government, the Australian Labor Party, established an interdepartmental committee[93] to examine the question of openness in government and access to information. At the same time, the Royal Commission on Australian Government Administration[94] was engaged in a study of all aspects of governmental administration, including access to information.

In its 1974 report, the interdepartmental committee included an outline for a freedom of information statute which was much criticized in the press and elsewhere. While this report was being publicly debated, a member of the royal commission also prepared a draft freedom of information bill, known as the Minority Report Bill (MRB), which was included as an appendix to the final report of the royal commission[95]. The Labor government took no action on the report of the interdepartmental committee before the 1975 election. After the election, the new government (a Liberal-Country Party coalition) established a second interdepartmental committee which produced a further report[96] and ultimately a draft bill was introduced in Parliament in 1978. The bill was critically assessed by many observers and was then referred to the Senate Standing Committee on Constitutional and Legal Affairs for further study[97]. The committee received a number of briefs from interested parties and held public hearings. Its report, published in 1979[98], makes several recommendations

for change in the government's bill, some of which are noted below.

Both the MRB and the government bill are similar in structure to the U.S. Freedom of Information Act. They confer a general public right of access to government information, subject to certain specified exemptions. The exemptions are permissive: information that would be covered by an exemption may nevertheless be released by ministers or other officials.

The government bill requires officials to reply to a request for information within sixty days, after which an appeal to the permanent head of the department is allowed. A further outside appeal may be made to the Administrative Appeals Tribunal within twenty-eight days from the refusal of a department head. An appeal to the Ombudsman is also permitted, and if the Ombudsman intervenes, the sixty-day time period does not run. If the Ombudsman finds that the agency is delaying unnecessarily, the sixty-day time limit automatically expires and an appeal to the tribunal may be launched immediately. The MRB requires a response to a request for information within ten days, with a possible extension for a further ten days. The appeal provisions in the MRB are similar to those in the government bill.

The government bill provides that fees, to be set by regulation, must be paid by a requester before access will be granted. The MRB limits fees to direct copying charges.

The MRB attempts to avoid the problems that occurred in the United States over interpretation of the exemption provisions by being precise in its language. In addition to listing the kinds of documents exempt from public access, it lists the kinds of documents expressly deemed not to fall within the exemption. An attempt is thus made to limit the exercise of discretion and to assist officials in applying the exemptions.

The exemption provisions in the government bill, on the other hand, set out harms tests. Documents containing information which if disclosed would prejudice the security, defence or international relations of Australia would be exempt from access, as would those which if released would be reasonably likely to hinder law enforcement or the administration of justice. In some cases, the harm must be "reasonably likely to occur"; in others, it must be "substantially likely to occur."

This difference in approach is illustrated by the exemption for "internal working documents." The government bill provides an exemption for internal working documents containing advice, opinions or recommendations (but not factual material), disclosure

of which would be contrary to the public interest. The MRB has a similar exemption for this kind of material, but it is qualified by a list of sixteen categories of documents which are not protected unless premature disclosure would impede decision making or the implementation of the policy. This list includes documents containing factual material, statistical surveys, cost-benefit analyses, reports from advisory committees, interdepartmental committees and task forces, final proposals for preparing subordinate legislation, efficiency audits, feasibility studies, internal agency law, Cabinet submissions (other than budgetary proposals) prepared within a department, and reasons given for the exercise of statutory discretion.

Both bills exempt Cabinet records from access. The MRB defines "Cabinet records" narrowly to ensure that only the actual deliberative process is protected. The MRB also requires that a register of Cabinet decisions be kept by the Prime Minister and that it be publicly accessible in certain circumstances. The government bill is similarly directed at protecting the deliberative process of Cabinet by exempting from access any records containing information that would reveal Cabinet proceedings; however, the government bill permits the Secretary of the Cabinet to certify that a document requested under the act is a "Cabinet document" and therefore exempt from access. If such a certificate is given, the independent Administrative Appeals Tribunal has no jurisdiction to review the decision to withhold the document. The MRB makes all such decisions to withhold subject to independent review by the tribunal.

With respect to "internal working papers," the government bill denies the tribunal jurisdiction to review a minister's or departmental head's decision to withhold documents on the ground that disclosure would be contrary to the public interest. However, the tribunal is permitted to examine the document and make an independent decision as to whether the document is truly one containing advice or recommendations.

One of the major issues in the Australian debate over freedom of information has been the question of ministerial control over the release of certain types of information. As noted above, the proposed government bill provides that certain decisions to withhold information cannot be reviewed by the outside appeal body. In its review of the provisions of the government bill, the Australian Senate Committee rejected the use of this conclusive certificate system as unacceptable in freedom of information legislation and recommended that the tribunal have the power, in the case of Cabinet documents, to assess the validity of a certificate claiming that a document was in fact a Cabinet document. Similarly, it recommended that the tribunal be empowered to review

a ministerial or agency decision to withhold internal working documents on the grounds of "public interest."

Although the Senate Committee came to these conclusions on the basis of its own assessment of these issues, it expressly drew support for its opinion that all decisions to withhold information should be subject to independent review from the decision of the Australian High Court in Sankey v. Whitlam[99] which was handed down while the Senate deliberations were in progress. In Sankey, the plaintiff sought production of a number of official documents, including records of certain government deliberations and decisions. The government claimed that the documents were privileged on the ground that disclosure would be harmful to the public interest. (If access had been sought to many of these documents under the government bill, they could have been protected by ministerial certificate.) The High Court held that it was ultimately responsible for deciding whether the claim of privilege should succeed, after balancing the two competing public interests at stake -- the public interest in the due administration of justice and the public interest in ensuring that no harm be done to the nation or the public service by disclosure of information. The court expressly repudiated the idea that these decisions should be exclusively under the control of the executive branch of government.

The Minority Report Bill (MRB) and appended commentary, the federal government committee reports and proposed bill, and the extensive report of the Australian Senate Committee on Constitutional and Legal Affairs provide a valuable source of analysis and discussion of freedom of information questions. We have found these materials to be of considerable assistance in our deliberations. Many of the specific proposals to be found in the MRB, the federal bill and the Senate Committee report will be described and considered in subsequent chapters of this report.

#### E. CANADA: DEVELOPMENTS AT THE FEDERAL LEVEL

Governmental information policy has been the subject of considerable debate at the federal level in Canada for the last decade or so[100]. In 1969, the federal Task Force on Government Information published a report critical of the government's traditional policy of administrative secrecy and recommended the adoption of various measures to facilitate the provision of information to the public[101]. The first federal initiative towards a freedom of information policy came in February 1973, when the Liberal government tabled in Parliament a set of administrative guidelines issued to government departments as a Cabinet directive, entitled "Notices of Motion for the Production

of Papers"[102]. Its purpose was to assist government officials in responding to requests for information from members of Parliament and the public.

The guidelines provided that information "should be" produced unless it fell within one of sixteen exempt categories. In addition to protecting the usual interests, such as the security of the state and the conduct of international and federal-provincial relations, the guidelines exempted from access all "cabinet documents" and all "internal departmental memoranda." Guidelines were also provided for consultants' reports, requiring that they be written in such a way that recommendations were separated from factual and analytical material. Material of the latter type could be released provided it was not covered by one of the exemptions.

In June 1973, a further directive dealing with public records was issued by the Cabinet[103]. The directive basically affirmed ministerial control over the transfer of public records to the Dominion Archives and over public access to records held in government departments. In that same year the cabinet directive on Notices of Motion and a private member's bill on freedom of information were referred to the Standing Joint Committee on Regulations and Other Statutory Instruments[104]. The committee held a number of hearings in 1974 and 1975 and tabled its report in Parliament in December 1975, endorsing the concept of freedom of information legislation. This report was approved by the House of Commons in February 1976.

The Green Paper tabled by the government in June 1977 explored various options for freedom of information legislation. A recurring theme was the need to preserve ministerial control over access to information. It became clear after the release of the Green Paper that the Liberal government was strongly opposed to independent review of ministerial decisions to withhold information.

The Green Paper was referred by the government to the Joint Committee in December 1977. After conducting extensive public hearings, the committee tabled a report in June 1978, containing recommendations favouring the adoption of a strong freedom of information law[105]. The committee's views were apparently much influenced by the U.S. Freedom of Information Act and the various proposals being considered in Australia. The committee recommended a statute containing a broad principle of public access subject to a short list of narrowly drawn exemptions.

## THE CANADIAN BAR ASSOCIATION MODEL BILL

The Canadian Bar Association (CBA) took an active role in the public debate that followed publication of the federal Green Paper. In August 1977, the CBA published a widely distributed critique of the Green Paper[106] and appointed a committee to give the matter further study and prepare a model freedom of information bill. The committee's draft was published with the endorsement of the CBA in March 1979[107].

The drafters of the bill were evidently much influenced by the U.S. experience and by the Australian Minority Report Bill. In brief, the CBA model bill establishes a right for any person[108] to inspect or obtain a copy of government-held information, with seven exemptions[109]. The request has to be specific enough for a knowledgeable employee to find the information without an unreasonable amount of effort[110]. A duty is imposed on the government to help the applicant by publishing descriptions of departmental functions, manuals and all secret law[111]. Information not published under these sections must be indexed[112].

Independent review by an information commissioner is allowed[113] with a subsequent appeal to the Federal Court, Trial Division[114]. Further appeals are allowed only on questions of law or jurisdiction[115]. While the information commissioner, an officer of Parliament[116], is empowered only to make recommendations[117], the federal court would have the power to order release[118]. Any notice of a refusal to grant access must include notice to the applicant of his appeal rights[119].

There are seven proposed exemptions[120], only one of which is "mandatory"[121] in character. The latter provides for the withholding of Cabinet documents, a term which is roughly defined to include records of Cabinet deliberations and other materials prepared for presentation to Cabinet[122]. All the other exemptions contain a balancing test: the public interest in disclosure is to be weighed against the harm, if any, which might occur if information were released. These exemptions relate to policy advice, national defence and international relations, law enforcement and legal proceedings, privacy of natural persons, commercial and financial information, and information protected by other statutes. As in the Australian Minority Report Bill, many of the CBA model bill's exemptions are introduced by a broad statement of general principle followed by the specific kinds of documents which cannot be withheld[123].

Under the model bill, those who submit personal or commercial and financial information and those about whom such information

is submitted are granted a limited right to participate in the decision-making process concerning release or withholding[124]. To give effect to this right, the bill requires an agency, to which an application for personal or commercial information has been made, to serve notice of the application on any person whose interests might, in the opinion of the agency, be substantially affected by release of the document[125].

When the CBA model bill was released, the Secretary of State indicated that the introduction of federal legislation was imminent. Shortly thereafter, however, the dissolution of Parliament was announced and a federal election was called for the spring of 1979.

#### BILL C-15

In May 1979, the Progressive Conservatives were elected with a minority government. The new government had campaigned on a platform which included freedom of information legislation; Bill C-15, the Freedom of Information Act, was introduced in the House in October 1979. In general terms, Bill C-15 adopted a freedom of information scheme on the U.S. model, providing a general right of access (subject to certain exemptions) and a right to seek independent review of decisions to withhold information from the public.

The press release accompanying the bill contained a list of the kinds of information the government expected to make routinely available. These included:

- factual material of all kinds;
- Cabinet discussion papers and some records of Cabinet decisions;
- drafting instructions for legislation;
- consultants' reports;
- program evaluations and assessments;
- documents stating and explaining policies;
- test reports, environmental impact statements, product testing results;
- technical and scientific research results and results of field research;

- statistical surveys;
- opinion survey results;
- feasibility studies;
- field reports, reports on operations, documents on the administration of acts and of programs;
- minutes of discussions with industry and industry briefs;
- internal government directives and manuals;
- administrative guidelines and instructions;
- rulings on interpretations;
- details of contracts;
- terms of reference for any work contracted out or for studies of departmental programs[126].

The bill created a right for every Canadian citizen or permanent resident to apply for access to government records[127]. The applicant was required to pay a fee[128] when making a request. Requests were to be answered within thirty days[129]. In contrast to the Green Paper, Bill C-15 accepted the notion of independent review of ministerial decisions to refuse access to government information. If a governmental institution refused access, the applicant could appeal to an information commissioner[130] who had the power to recommend full or partial release of the documents[131]. If the information commissioner refused to recommend release, or if the government ignored the commissioner's recommendation, then the applicant could appeal to the Federal Court[132] and subsequently to the Federal Court of Appeal and the Supreme Court of Canada. The bill repealed section 41(2) of the Federal Court Act which denies the court jurisdiction to inspect government documents if a minister certifies by affidavit that they contain information relating to national defence or security, federal-provincial relations, international relations or Cabinet proceedings[133].

Under the bill, exemptions[134] could be claimed for:

- records concerning international agreements and agreements with provinces;
- federal-provincial negotiations;

- international relations and defence;
- law enforcement and investigations;
- the safety of individuals;
- the economic interests of Canada;
- personal information;
- financial, commercial, scientific and technical information;
- Cabinet documents and policy advice;
- testing procedures, tests and audits (except those for consumer products and environmental data);
- solicitor-client communications;
- information whose disclosure is forbidden by other statutes;
- records which will be published within ninety days of the request.

The bill applied to most governmental institutions; these were listed in a schedule to the bill. The information commissioner was intended to provide an inexpensive appeal mechanism which would be particularly helpful at the early stages of implementing a new statute. The bill required that notices of refusal include reasons and information about the rights to appeal[135]. Court costs could be awarded to an unsuccessful applicant if the request for review raised a point of public interest[136]. The information commissioner was required to prepare an annual report[137] of how the statute was working; a complete review would be undertaken three years after the bill came into force[138].

The bill did not include provisions establishing rights of any kind for submitters of information who wished to protest a proposed disclosure. Nor did the bill make reference to or advance reforms with respect to the Official Secrets Act. However, a discussion paper prepared by the Privy Council (which was made public when the bill was introduced) suggested that the Official Secrets Act would not be an impediment to implementation of freedom of information legislation because any disclosure made under an access statute would be "authorized" and therefore not in breach of the Official Secrets Act. The government did indicate,

however, its intention to bring forward suggested reforms of the act in due course.

Bill C-15 was referred to the Standing Joint Committee on the Constitution and Legal Affairs, which began its hearings in December 1979. In that same month, however, the minority government was defeated in the House. In the ensuing 1980 election, the Liberal party was returned to power. In the April 14 throne speech indications were given that the new government would be introducing freedom of information legislation in the near future.

Reform of the Official Secrets Act is at present under consideration by the Commission of Inquiry Concerning Certain Activities of the RCMP (the McDonald Commission). In Chapter 7, we indicate in general terms the nature of the recommendations made by the commission in its first report.

#### F. CANADA: DEVELOPMENTS AT THE PROVINCIAL LEVEL

Two Canadian provinces, Nova Scotia and New Brunswick, have enacted freedom of information legislation.

##### **NOVA SCOTIA**

With the enactment of its Freedom of Information Act[139] on November 1, 1977, Nova Scotia became the first Commonwealth jurisdiction to provide a legal right to government-held information. The Nova Scotia act applies to all government departments and all boards, agencies, commissions or other bodies whose members are appointed by the government or are responsible to the Crown[140].

Unlike the U.S. legislation or that proposed for Australia, the Nova Scotia act does not confer a general right of access to information subject to certain exemptions. The right of access set forth in the statute applies only to information respecting the following matters:

- a. organization of a department;
- b. administrative staff manuals and instructions to staff that affect a member of the public;
- c. rules of procedure;
- d. descriptions of forms available or places at which forms may be obtained;

- e. statements of general policy or interpretations of general applicability formulated and adopted by a department;
- f. final decisions of administrative tribunals;
- g. personal information contained in files pertaining to the person making the request;
- h. the annual report and regulations of a department;
- i. programs and policies of a department; and
- j. each amendment, revision or repeal of the foregoing[141].

In essence, then, the act only requires disclosure of internal agency law and of personal information about the applicant held in government records. It must also be noted that this limited degree of access to government records is further restricted by provisions which expressly prohibit the disclosure of any information if it would interfere with investigatory proceedings, or would reveal personal information about another person, the advice or opinions of public servants, draft legislation or information whose confidentiality is protected by statute.

The act provides that where the records requested contain both exempt and non-exempt material, the non-exempt must be separated from the exempt and made available[142]. The restrictions on access do not apply to information which, prior to the passage of the legislation, was made available to the public "by custom or practice"[143].

Requests for information must be answered by departmental officials or the deputy head of the department within fifteen days. If the request is denied, the applicant may appeal to the appropriate minister. If the minister upholds the denial, then the applicant's final appeal must be to the provincial legislature. This appeal must be presented by a member of the legislature in the form of a motion in accordance with the rules of the House[144]. The final decision on release of information is made by a majority vote in the legislature. Thus, if the government party holds a majority of seats in the legislature it will maintain control over decisions to grant public access to information. There is no provision for an appeal to the courts or to a provincial ombudsman.

The Nova Scotia act contains several provisions aimed at protecting personal privacy. Any person may have access to government records containing personal information about him[145]. In addition, he may request that these records be corrected and that information about him collected for one purpose not be used for another without his prior consent. If the government agency refuses to amend the information in the records in accordance with his request, the applicant may seek injunctive relief in the courts[146]. Government departments cannot maintain secret data banks or records containing personal information: the existence of all such records must be disclosed[147].

Since the Freedom of Information Act was passed, a new government has been elected in Nova Scotia. The present government has stated that it intends to revise the act substantially to permit greater public access to information, and we understand that changes are currently under consideration.

#### NEW BRUNSWICK

In 1974, the New Brunswick government tabled in the legislature a White Paper on access to information, but it was received with little comment. A second version was tabled in June 1977 and an ad hoc committee, whose membership included officials of the Cabinet secretariat and the provincial law reform commission, was appointed to review the White Paper. This committee drew up a draft statute which was introduced in the legislature in the spring of 1978. The legislation was enacted and received royal assent in June of that year. The New Brunswick Right to Information Act[148] was proclaimed in force on January 1, 1980.

The general scheme of the New Brunswick statute is similar to that of the U.S. act and the Australian federal bill. It confers a general public right to information subject to certain specified exemptions. Unlike the Nova Scotia statute, the exemptions are "permissive" in the sense that even if requested information falls within an exemption, the government may release it. The act applies to all government departments, Crown agencies or Crown corporations, any branch of the public service and any other body whose operations are paid for with public funds[149].

An individual who wishes to exercise his statutory right of access must apply to the appropriate minister, describing the subject matter of the information requested with enough particularity to enable an official familiar with the area to identify the relevant documents[150]. The minister must respond to the request within thirty days[151]. If the request is granted, the applicant, on payment of a fee, is then entitled to inspect the

documents. The statute confers a discretion on the minister to refuse to provide copies if it would be too costly to do so in a particular case[152].

If a minister refuses to grant access to the requested information, the individual making the request is entitled to refer the matter either to the Ombudsman or to a judge of the Supreme Court[153]. The Ombudsman has power to investigate the matter and make recommendations to the minister. A judge of the Supreme Court, on the other hand, has the power to order that the minister disclose the information requested if he finds it has been wrongfully withheld. A decision of a judge of the Supreme Court is not subject to further appeal[154]. If the applicant applies first to the Ombudsman and is dissatisfied with the minister's response to the Ombudsman's recommendations, he can then appeal to the court for a review of the minister's decision. There are no restrictions on the scope of this judicial review. In proceedings before the Ombudsman or the court, the onus is on the minister to show that there is no right to the information requested under the act[155]. A successful applicant is entitled to an award of court costs and, if unsuccessful, may be awarded costs if the court considers it in the public interest to do so[156].

Briefly described, the exemptions to the general rule of public access provide that the government cannot be required to disclose information if its disclosure would:

- be a breach of confidentiality protected by law;
- reveal personal information about another person;
- cause financial loss or gain, or prejudice negotiations;
- violate the confidentiality of information supplied by other governments;
- be detrimental to the administration of the penal system;
- disclose legal advice or opinion, or the advice and opinions of the civil service tendered to ministers of the Cabinet;
- reveal the substance of proposed legislation or regulation;
- impede an investigation, inquiry or the administration of justice[157].

Because the statute has only been in operation since January 1980, we have not been able to determine how these exemptions, some of them very broadly drafted, will be applied in practice.

When the bill was introduced in the House in 1978, the Premier indicated that the government would establish an advisory board to oversee its implementation. The bill was amended by the House, prior to final reading, to provide for review by the legislative assembly thirty months from the date it was proclaimed[158].

#### G. BRITAIN

The issue of public access to government-held information has been the subject of a number of inquiries and proposals in Britain during the past decade. However, both the former Labour and the present Conservative governments have resisted the introduction of legislation that would interfere with the discretion of ministers to decide what information should be available to the public. Basically, disclosure of information at the national level in Britain continues to be subject to the Official Secrets Act of 1911 which makes the unauthorized disclosure of information by public servants a criminal offence. (At the local level, governmental bodies are required by statute to disclose certain kinds of information, such as financial statements and minutes of meetings.)

In 1968, the Fulton Committee undertook an examination of the operations of the British civil service and concluded that the administrative process was surrounded by an unnecessary degree of secrecy. The committee recommended that the government set up an inquiry to investigate and make recommendations with respect to government secrecy in Britain[159]. A year later, the Labour government tabled a White Paper which concluded that existing information practices were on the whole adequate; no changes were recommended[160].

In 1971, a prosecution was brought under the Official Secrets Act against the Sunday Telegraph, its editor and two others for the publication of a secret government report on the Nigerian civil war. The trial judge acquitted all four defendants and in his summing-up recommended that section 2 of the Official Secrets Act under which the prosecution was brought be "pensioned-off"[161]. Three months later, a committee of inquiry (the Franks Committee) was established for the purpose of reviewing the operation of section 2 of the Official Secrets Act. In its 1972 report, the Franks Committee recommended that the Official Secrets Act be repealed and replaced by a statute containing more specific provisions setting out the kinds of information the disclosure

of which should be a criminal offence. The committee did not, however, recommend the enactment of a statute guaranteeing a right of public access to government information[162].

No further action was taken until November 1976, when the Labour government, under pressure from its own caucus as well as members of the press and public, announced that the government would adopt a new policy of openness. In August 1977 the Prime Minister's Office announced that guidelines had been circulated to heads of departments advising them to implement practices to facilitate openness. One of the changes recommended in these guidelines was that background material for policy studies and reports be written in such a way that factual material could be separated from policy advice and published.

In July 1978, a White Paper on the Official Secrets Act, prepared by a committee of Cabinet, was released. The White Paper did not directly address the issue of freedom of information, other than to state that more detailed studies of this type of legislation should be made[163]. The composition of the Cabinet committee was not disclosed; nor were any of the background papers made available[164]. Throughout 1978, the Labour government came under increasing pressure from the members of its own party to adopt freedom of information legislation. However, although the annual conference of the Labour party in October 1978 had unanimously approved a draft bill prepared by the National Executive Committee, in November the government announced that no such legislation would be introduced[165]. In March 1979, the government tabled another White Paper which proposed the adoption of an administrative Code of Practice to facilitate openness in government[166]. The code preserved ministerial control over the release of information.

In May 1979 the Conservative government took office and in November of that year introduced the Protection of Official Information Bill, which was intended to reform section 2 of the Official Secrets Act. Critics of the bill contended that it was in fact even more restrictive than the act it was supposed to replace: it created a number of vaguely-defined offences and prohibited judicial review of ministers' certificates of classification of documents, even if the information contained therein was already in the public domain[167]. It also imposed severe restrictions on news gathering by, in effect, forbidding journalists to write about such matters as civil defence, prison conditions, telephone tapping and the intelligence services generally[168]. However, in the wake of public outcry over a highly publicized espionage case, the government withdrew the bill[169]. No new legislative initiatives have been taken since that time. Although there does not appear to be any immediate

prospect of the enactment of freedom of information legislation in Britain, a formidable lobby favouring the adoption of such laws has emerged in recent years: the lobby includes members of the press, the Law Society, parliamentary backbenchers and public interest groups[170]. Debate over the issue of government secrecy in Britain will no doubt continue in years to come.

## CHAPTER 6 NOTES

- 1 Donald C. Rowat, Public Access to Government Documents: A Comparative Perspective (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 3, 1978). See also D. Rowat, ed., Administrative Secrecy in Developed Countries (New York: Columbia University Press, 1978). The book has chapters on Sweden, Finland, Denmark, Norway, Belgium, France, the United Kingdom, the Federal Republic of Germany, Hungary, Yugoslavia, Canada and the United States.
- 2 5 U.S.C. 552 (1966).
- 3 See House and Senate Reports: H. Rep. 93-876, 93d Cong. 2d Sess. (1974); S. Rep. 93-854, 93d Cong. 2d Sess. (1974); H. Rep. 93-1380, 93d Cong. 2d Sess. (1974).
- 4 For a general description of the Australian system, see H. Mitchell, Access to Information and Policy Making: A Comparative Study (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 16, 1980), hereafter cited as Mitchell. Much of the material in this chapter is based on that research paper.
- 5 Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979) hereafter cited as Senate Report.
- 6 The Freedom of the Press Act, hereafter cited as FPA. Unless otherwise noted, all references to Swedish statutes in this chapter are to the English translations in Constitutional Documents of Sweden (Stockholm: Swedish Riksdag, Norstedts Tryckeri, 1975 and 1978).
- 7 To amend a constitutional statute in Sweden requires two votes of the legislature with an intervening election. In this way, a change in the Constitution can be put forward as an election issue and the citizens have the right to express their preference at election time. An ordinary law needs only one majority vote in the legislature for its amendment.
- 8 J.B. Board, The Government and Politics of Sweden (Boston: Houghton Mifflin, 1970) 143.
- 9 In the Swedish governmental structure, ministries are small policy-making bodies, whereas the agencies are much larger

administrative bodies that implement the policies once put into legislation or approved by the Cabinet. The ministers are not responsible for the agencies, although the agencies are often analogous to the policy area for which the minister is responsible. From the point of view of access to information, the importance of the separation lies in the fact that as soon as information goes from an agency to a ministry or vice-versa, it becomes accessible.

- 10 Two new statutes were passed in the early 1970s; one regulates appeals on legal issues (*Forvaltningslagen*) and the other regulates appeals on administrative issues (*Forvaltningsprocesslagen*). Before these reforms, it was difficult to distinguish between internal administrative appeals and Administrative Court appeals.
- 11 FPA, Chapter 2 passim.
- 12 Law No. 249 of May 28, 1937 as amended to January 1, 1975 (unpublished translation).
- 13 Secrecy Act, s. 38.
- 14 Ibid., s. 34(a).
- 15 Ibid., s. 41.
- 16 See, generally, D.J. Mullan, Rule-Making Hearings: a General Statute for Ontario? (Toronto: Committee on Freedom of Information and Individual Privacy, Research Publication 9, 1979).
- 17 P.L. 94-409, (1976) 90 Stat. 1241.
- 18 Pub. L. 92-463 (1972) 86 Stat. 770.
- 19 60 Stat 238.
- 20 5 USC 551.
- 21 See Ciba-Gigy Corp. v. Matthews, 428 F. Supp. 523 (S.D.N.Y., 1977).
- 22 Porter County Chapter of the Isaak Walton League v. AEC, 380 F. Supp. 630 (N.D. Ind., 1974).
- 23 Ibid. An appeal must be determined within two days: FOIA s. (6)(A)(ii).

- 24 Under "unusual circumstances" the agency can extend the time up to ten working days.
- 25 FOIA, s. 4(A).
- 26 Ibid., s. (a)(B).
- 27 Ibid., s. (a)(1)(D).
- 28 Ibid., s. (a)(3).
- 29 Ibid., s. (a)(1) and (2).
- 30 EPA v. Mink, 410 U.S. 73 (1973).
- 31 Three of the exemptions make reference to other sources of legal rules which must be resorted to in order to interpret the scope of the exemption. These are the exemptions relating to material protected by an executive order ((b)(1)), the discovery rules ((b)(5)) or other statutes ((b)(3)).
- 32 The Attorney General's letter of May 5, 1977, reprinted in the Congressional Record of May 17, 1977 (daily edition) S7763. See also Access Reports, May 17, 1977, 2.
- 33 The current order is Executive Order 12065 of June 28, 1978.
- 34 For a comprehensive discussion see: Executive privilege, Secrecy in Government, Freedom of Information Hearings, U.S. Senate, 93rd Cong. 2nd Sess. (1973); and U.S. Government Information Policies and Practices Hearings, House Committee on Government Operations, 92nd Cong. 1st and 2nd Sess. (1973).
- 35 See, for example, U.S. v. Reynolds 345 US 1 (1953).
- 36 S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).
- 37 For example, the Supreme Court adopted it in Vaughn v. Rosen (I), 415 U.S. 997 (1974).
- 38 Department of the Air Force v. Rose, 425 U.S. 352 (1976) at 369.
- 39 H.R. Report, No. 1497, 89th Cong., 2d Sess. 10 (1966).
- 40 Hawkes v. IRS, 467 F. 2d 787 (6th Cir. 1972).

- 41      Lord and Taylor v. Department of Labour, 22 WH Case 1245  
(S.D.N.Y. September 3, 1976).
- 42      Ginsberg, Feldman and Bress v. Federal Energy Administration,  
Civ. No. 76-27 (D.D.C. June 18, 1976).
- 43      City of Concord v. Ambrose, 333 F. Suppl., 958.
- 44      422 U.S. 255 (1975).
- 45      49 U.S.C. 1504 s. 1104.
- 46      Pub. L. 94-409 (1976).
- 47      Consumers Union v. Veteran's Administration 301 F. Supp. 796  
(S.D.N.Y. 1969) quoting United States ex rel. Norwegian  
Nitrogen Products Co. v. United States Tariff Comm. 6 F. 2d  
491 at 495 (D.C. cir. 1975) as cited in C. Marwick, ed.,  
Litigation Under the Amended Freedom of Information Act  
(Washington: Project on National Security and Civil  
Liberties, 1977), cited hereafter as Marwick.
- 48      See Grumman Aircraft Engineering Corp. v. Renegotiation  
Board, 425 F. 2d 578 (D.C. Cir. 1970).
- 49      National Parks and Conservation Association v. Morton, 498  
F. 2d 765 (D.C. Cir. 1974).
- 50      Ibid., 770.
- 51      N.D. Campbell, "Reverse Freedom of Information Act  
Litigation: The Need for Congressional Action," (1978) 67  
Georgetown Law Journal 103.
- 52      441 U.S. 281 (1979).
- 53      Mead Data Central, Inc. v. Dept. of the Air Force, 402 F.  
Supp. 460 (D.D.C. 1975), remanded, 566 F. 2d (D.C. Cir.  
1977).
- 54      See Carl Zeiss Stiftung v. Carl Zeiss, Jena, 40 F.R.D. 318  
(D.D.C. 1966) aff'd 384 F. 2d 979, cert. denied 389 U.S. 952  
(1967), and NLRB v. Sears, Roebuck & Co., 421 U.S. 132  
(1975).
- 55      410 U.S. 73 (1973) at 89.
- 56      Washington Research Project v. HEW, 504 F. 2d 238 (D.C. Cir.  
1974) aff'd 523 F. 2d 1136 (D.C. Cir. 1975).

- 57 383 F. Supp. 1049 (D.D.C. 1974) aff'd 523 F. 2d 1136 (D.C. Cir. 1975).
- 58 420 F. 2d 1336 at 1341 (D.C. Cir. 1969).
- 59 Merrill v. Federal Open Market Committee, 565 F. 2d 778 (D.C. Cir. 1977).
- 60 See NLRB v. Sears Roebeck Co.
- 61 Sterling Drug Inc. v. Federal Trade Commission, 450 F. 2d 698 (D.C. Cir. 1971) and Consumer's Union v. Veteran's Administration, 301 F. Supp. 796 (S.C.N.Y. 1969).
- 62 NLRB v. Sears Roebuck Co.
- 63 American Mail Line Ltd. v. Gulick, 411 F. 2d 296 (D.C. Cir. 1969); Niemeyer v. Watergate Special Prosecution Force, 565 F. 2d 967 (7th Cir. 1977).
- 64 NLRB v. Sears Roebuck Co.
- 65 Grumman Aircraft v. Renegotiation Board, 482 F. 2d 710 (D.C. Cir. 1973) rev'd 421 U.S. 168 (1975).
- 66 NLRB v. Sears Roebuck; see also David B. Lilly Co. v. Renegotiation Board, 521 F. 2d 315 (D.C. Cir. 1975); and see Kent Corp. v. N.L.R.B. 530 F. 2d 612 (5th Cir. 1976) and Sterling Drug Co. Inc. v. FTC.
- 67 464 F. 2d 657 (6th Cir. 1972).
- 68 Union of Concerned Scientists v. Nuclear Regulatory Commission, Civ. No. 76-370 (D.D.C. 1977).
- 69 Moore-McCormick Lines, Inc. v. ITO Corp. of Baltimore, 508 F. 2d 945 (4th Cir. 1974).
- 70 Committee on Masonic Homes v. NLRB, 556 F. 2d 214 (3d Cir. 1977).
- 71 Larry P. Elsworth, "Exemption 7 of the FOIA: Law Enforcement Records," in Marwick, 54, citing Wiseberg v. Dept. of Justice, 489 F. 2d 1195 (D.C. Cir. 1973), cert. denied 416 U.S. 993 (1974).

- 72 Attorney General's Memorandum of the 1974 amendments, February 1975, 6: 1975 Source Book, 516. And see, generally, Ellsworth, "Amended Exemption 7 of the Freedom of Information Act," 25 Am. U.L. Rev. 87 (1975), and Note, "The Investigatory Files Exemption of the FOIA: The D.C. Circuit Abandons Bristol-Myers," 42 Geo. Wash. L. Rev. 369 (1974).
- 73 Committee on Masonic Homes v. NLRB, 556 F. 2d 214 (3d Cir., 1977). As far as past proceedings are concerned, the protection of confidential information is illustrative of the need for sustaining exempt status. See, for example, Shaver v. Bell, 433 F. Supp. 438 (N.D. Ga., 1977).
- 74 Conference Report No. 93-1200; 1975 Source Book, 229.
- 75 S. Rep. 813, 89th Cong., 1st Sess. 10 (1965); 1974 Source Book, 45.
- 76 M.A. Schapiro & Co. Inc. v. SEC, 339 F. Supp. 467 (DC DC, 1972).
- 77 James T. O'Reilly, Federal Disclosure Law (Colorado Springs: Shepard's Inc., 1978) 18-3 cited hereafter as O'Reilly.
- 78 S. (a)(4)(F).
- 79 H. Rept. No. 92-1419, 10; 1975 Source Book, 17.
- 80 S. Rept. No. 93-854, 33; 1975 Source Book, 185.
- 81 See generally, Harold C. Relyea, The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports (Washington: Congressional Research Service, Library of Congress). This is an annual publication. The figure quoted is from the survey of reports for 1977.
- 82 K.C. Davis, 1 Administration Law Treatise (2d ed.) 445 (1978).
- 83 Informed observers have suggested more than \$1 billion as a possible figure. See U.S. Senate Committee on the Judiciary, Report on Oversight Hearings: Agency Implementation of the 1974 Amendments to the Freedom of Information Act (Washington, D.C.: US GPO, March 1980) 59.
- 84 Pub. L. 94-409, 5 U.S.C. 552b (1976).
- 85 Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App. I (1972).

- 86 For example, the Federal Reserve Board (monetary policy and financial institutions), the National Labor Relations Board (labour-management relations), and the Interstate Commerce Commission (transportation).
- 87 O'Reilly, 23-2.
- 88 Notice must be published in the Federal Register.
- 89 W.E. McClain, ed., A Summary of Freedom of Information and Privacy Laws of the 50 States (Washington: Plus Publications, 1978) and James T. O'Reilly, Federal Information Disclosure (Colorado Springs: Shepards, Inc., 1978).
- 90 California Public Records Act, S. 6252 (d).
- 91 N.Y. Public Officers Law, Article 6, Freedom of Information Law, ss. 84-90.
- 92 Ibid., s. 84.
- 93 Attorney General's Department, Proposed Freedom of Information Legislation: Report of the Interdepartmental Committee (Canberra: Australian Government Publishing Service, 1974).
- 94 Report of the Royal Commission on Australian Government Administration (Canberra: Australian Government Publishing Service, 1976).
- 95 Ibid., Appendix Two.
- 96 Policy Proposals for Freedom of Information Legislation: Report of the Interdepartmental Committee, 1976, Parliamentary Paper No. 400/1976 (Canberra: Australian Government Publishing Service, 1977).
- 97 The committee was also asked to review certain aspects of a new archives bill relating to the question of public access to government documents.
- 98 Senate Standing Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill, 1978 and Aspects of the Archives Bill, 1978 (Canberra: Australian Government Publishing Service, 1979).
- 99 [1978] 53 A.L.J.R. 11.

- 100 See generally, D.C. Rowat, "Canada," in D.C. Rowat, ed., Administrative Secrecy in Developed Countries (New York: Columbia University Press, 1979) Chapter 11; G.B. Doern, "Canada," in I. Galnoor, ed., Government Secrecy in Democracies (New York: Colophon Books, 1977) Chapter 9.
- 101 Report: To Know and Be Known (Ottawa: Queen's Printer, 1969).
- 102 The guidelines are reproduced in Department of the Secretary of State, Legislation on Public Access to Government Documents (Ottawa: Minister of Supply and Services, 1977) 31; hereafter cited as the Green Paper.
- 103 Reproduced ibid., 35.
- 104 The private member's bill, An Act respecting the Rights of the Public to Information Concerning the Public Business, was one of a series of similar bills introduced by Gerald Baldwin, M.P. (P.C., Peace River), who has been the leading parliamentary proponent of freedom of information in Canada for several years.
- 105 Fifth Report of the Standing Joint Committee on Regulations and other Statutory Instruments, Report on Green Paper on Legislation on Public Access to Government Documents, June 28, 1978.
- 106 T.M. Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, 1977).
- 107 Freedom of Information in Canada: A Model Bill (Ottawa: Canadian Bar Association, 1979), hereafter cited as CBA bill.
- 108 Ibid., s. 3(1).
- 109 Ibid., ss. 21-28.
- 110 Ibid., s. 3(2).
- 111 Ibid., ss. 29-32(1).
- 112 Ibid., s. 32(2).
- 113 Ibid., s. 11.
- 114 Ibid., s. 16.
- 115 Ibid., s. 20.

116 Ibid., s. 11(1).

117 Ibid., s. 14.

118 Ibid., s. 17(5).

119 Ibid., s. 7(4)(c).

120 Ibid., ss. 21-28.

121 Although the language of the section 21 exemption (Cabinet records) is mandatory, s. 28(2) provides that the head of an agency may disclose information otherwise exempt under s. 21 "if in the opinion of the head of the agency the public interest in disclosure and the interest of the person requesting the record outweigh the interests in non-disclosure."

122 The exemption does not apply to Cabinet records brought into existence after the bill comes into force, after they are ten years old: s. 21(2).

123 For example, s. 22(2) limits the policy exemption with fourteen specifics; s. 24(2) limits the law enforcement exemption with six specifics and s. 26(2) limits the commercial and financial information exemption.

124 CBA Bill, s. 18.

125 Ibid., s. 6(4).

126 President of the Privy Council, press release, Wednesday, October 24, 1979.

127 Canada, Bill C-15, 31st Parliament, 28 Elizabeth II, 1979 (first reading, October 24, 1979), s. 4.

128 Ibid., s. 11(1)(a).

129 Ibid., ss. 7, 8.

130 Ibid., s. 29.

131 Ibid., s. 35.

132 Ibid., s. 41.

133 Ibid., s. 70.

- 134 Ibid., ss. 13-27.
- 135 Ibid., s. 10(1).
- 136 Ibid., s. 47(2).
- 137 Ibid., s. 37.
- 138 Ibid., s. 66(2).
- 139 S.N.S. 1977, c. 10.
- 140 Ibid., s. 2(d).
- 141 Ibid., s. 3.
- 142 Ibid., s. 7.
- 143 Ibid., s. 5.
- 144 Ibid., ss. 9-13.
- 145 Ibid., s. 13(2).
- 146 Ibid., s. 6.
- 147 Ibid., s. 6(2)(b).
- 148 S.N.B. 1978, c. R-10.3.
- 149 Ibid., s. 1. A list of the government institutions covered by the act is set out in Schedule A of Regulation 79-889 promulgated on October 17, 1979.
- 150 Ibid., s. 3(2).
- 151 Ibid., s. 3(1).
- 152 Ibid., s. 4(1)(a). The regulations prescribe a fee of \$5.00 for each request. The cost of a photocopy is set at ten cents a page.
- 153 Ibid., s. 7.
- 154 Ibid., s. 8(3).
- 155 Ibid., s. 12.
- 156 Ibid., s. 13.

- 157 Ibid., s. 6.
- 158 Ibid., s. 15.
- 159 Fulton Committee, Report of the Committee on the Civil Service (1968; Cmnd. 3638) 91.
- 160 Information and the Public Interest (1969; Cmnd. 4089).
- 161 Peter White, "Official Secrets and Government Openness in Britain," The Australian Library Journal, February 22, 1980, 20; hereafter cited as White, "Official Secrets."
- 162 Franks Committee, Report of the Departmental Committee on Section 2 of the Official Secrets Act, 1911 (1972; Cmnd. 5104). Although it received many submissions in favour of such legislation, it was the Committee's view that this issue was beyond its terms of reference; see White, "Official Secrets," 24.
- 163 Home Office, Reform of Section 2 of the Official Secrets Act, 1911 (1978; Cmnd. 7285).
- 164 White, "Official Secrets," 26.
- 165 Ibid., 27.
- 166 HMSO, Open Government (1979; Cmnd. 7520).
- 167 Trevor Barnes, "Open Up: Britain and Freedom of Information in the 1980s," in Fabian Tract 467 (London: The Fabian Society, 1980) 5, cited hereafter as Barnes.
- 168 Ibid., 5.
- 169 In a book published at that time, it was revealed that a highly placed civil servant, Anthony Blunt, has been the "fourth man" in the Philby-Burgess-Maclean spy scandal. Publication of the book could have constituted an offence if the government bill had been law.
- 170 Barnes, 6.



## CHAPTER 7

# Legal Framework of Government Secrecy and the Right to Know

Our purpose in this chapter is not to give an authoritative treatment of the relevant body of law, but rather to set the stage for a description of the current information practices discussed in the next chapter and to anticipate, to some extent, the legal implications of freedom of information proposals[1].

In the first section of the chapter, the laws pertaining to oaths of secrecy, statutory prohibitions against disclosure, Crown privilege and the Official Secrets Act are briefly described. In the second section, a description is given of the laws providing for the creation of public records of various kinds as well as the laws affording access to information by parties involved in administrative proceedings.

### A. GOVERNMENT SECRECY

#### OATHS OF SECRECY IN THE ONTARIO GOVERNMENT

The Public Service Act of Ontario[2] requires each provincial civil servant to take an oath in the following words:

...except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant. So help me God[3].

The oath originated in 1947 during the so-called cold war, as part of a general amendment to The Public Service Act. It is perhaps not without significance that, in this atmosphere, the inclusion of the oath of secrecy for the first time passed the legislature without debate and virtually without comment[4].

No case concerning the meaning of the oath has gone to the courts and no legal interpretation has ever been given. However, the wording of the oath has been the subject of much criticism in recent times. In 1979, in an address to the Conference on Law and Public Affairs, the Honourable J.C. McRuer commented as follows:

You will note that the language is a clear prohibition on disclosure, "except as I may be legally required," not

"legally permitted." What is a legal requirement? Nowhere do we find the term defined. In other statutes relative to non-disclosure, such words as "to any person, not legally entitled thereto" are used. This is quite a different definition: "legally required" connotes some legal compulsion, while on the other hand, non-disclosure, except to any person legally entitled thereto, emphasizes the entitlement, not requirement. The "legal requirement" provision would appear to prohibit the private secretary to a minister from disclosing that the minister has a cold; but the latter provision would likely be construed that he would be at liberty to give me that information. The form of the oath imposed on civil servants is a legal absurdity[5].

Obviously, in practice, many civil servants must, as a matter of daily routine, breach this oath in order to carry out their duties. In briefs presented to this Commission and in interviews with Commission staff, many civil servants voiced concern about the broad language of the oath and expressed a desire for clearer guidance on this question.

Although The Public Service Act itself provides no penalty for breach of the secrecy oath, it is possible that internal disciplinary sanctions could be used against a civil servant who is found in breach of the oath. We do not know how often disciplinary sanctions short of dismissal may be employed for violations of secrecy oaths. There appears to be only one case of outright dismissal on this ground[6].

The apparently rare imposition of the ultimate penalty of dismissal may indicate that the confusion surrounding the scope of the oath inhibits disciplinary action by supervisors. On the other hand, it may be an indication of the extent to which many public servants have internalized the view that the preservation of secrecy in government is a moral duty worthy of their highest allegiance, thus making disciplinary action to enforce it unnecessary. The same considerations could explain the absence of any reported prosecutions of civil servants for violation of the express statutory provisions requiring secrecy, which will be discussed later in this section[7].

Although of widest application, the general oath under the act is not the only secrecy oath required in Ontario government service. At least fourteen other Ontario statutes contain secrecy oaths similar to that of The Public Service Act[8]. This has been necessary because this act does not apply to certain categories of public employees, such as members of boards or tribunals, employees of Crown corporations, employees of the Office of the Assembly, or employees of other government agencies who are not

considered part of the formal civil service and who therefore would not be subject to the general oath.

Many of these statutory oaths allow the official some discretion in the preservation of secrecy. For example, a member of the Ontario Labour Relations Board must swear not to disclose to any person any matter brought before the board "except in the discharge of [his] duties"[9].

Similarly, the Ombudsman is subject to an oath not to disclose any information he may acquire as Ombudsman except

...such matters as in his opinion ought to be disclosed in order to establish grounds for his conclusions and recommendations[10].

The Private Sanitaria Act[11] allows members of the Board of Visitors who are charged with the responsibility of ensuring that private sanitaria conform to government standards, to take an oath in the following terms:

I...do swear...that I will keep secret all such matters as come to my knowledge in the execution of my office, except when required to divulge the same by legal authority, or so far as I feel myself called upon to do so for the better execution of the duty imposed upon me by the Act[12].  
[emphasis added]

Thus, at higher levels of the civil service, the prohibition against the disclosure of information is modified to a certain extent. Although oaths of secrecy are still required, some discretion is permitted in disclosure of information obtained in the course of public duties.

As noted above, members of the provincial Cabinet are also obliged to take an oath of secrecy in which they promise to "keep close and secret" all matters which are the subject of Cabinet discussions and deliberations[13]. This oath is not required by any statute or regulation; presumably it serves to reinforce the long tradition of Cabinet secrecy and impress it upon the minds of ministers.

Although it seems to be generally acknowledged that secrecy oaths have no legal effect in that there is no penal sanction for a breach, they have an inhibiting effect on government employees in their dealings with the public. This may be especially true of those government employees who take the general oath under The Public Service Act, which leaves no room for the exercise of judgment or discretion. It should be noted that these are the

very employees who are most likely to deal with the public on a daily basis. The imposition of a moral obligation to preserve secrecy, coupled with the possibility of disciplinary sanctions for a breach, provide powerful incentives for government employees to err on the side of secrecy. The prudent civil servant will seek direction from those higher up in the chain of command before releasing any information, however innocuous, to the public. It is obvious that the atmosphere of secrecy and uncertainty encouraged by the pervasiveness of such oaths in the public service does little to enhance public trust and confidence in government.

However, oaths are not the only means used to ensure secrecy in Ontario government operations. Express statutory provisions abound in Ontario statutes, and may have even greater impact than secrecy oaths.

#### STATUTORY SECRECY PROVISIONS

In addition to the moral obligation to preserve secrecy imposed on Ontario civil servants through the use of oaths, secrecy in government is further strengthened by provisions in over 120 Ontario statutes, many of which make it an offence for a civil servant to disclose any matter that may come to his knowledge in the course of his duties.

Examination and comparison of these statutes fails to reveal any coherent general policy in Ontario underlying the legislative decision to allow or deny access to information held by the government. Those statutory exceptions which do permit some degree of public access to information appear to have developed ad hoc, either in response to pressure from interest groups or through government recognition of a public interest in disclosure in particular contexts. Instead of a clearly identifiable policy as to what types of information should or should not be a matter of public record, there seem to be almost as many "policies" as there are statutes.

The most common statutory secrecy provision is as follows:

Each person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation...shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person[14].

This standard form provision then goes on to list three circumstances under which a civil servant is permitted to communicate information: when it is necessary in connection with the administration of the act, in order to brief counsel, or if the person to whom the information relates consents to disclosure.

Provisions with substantially the same language appear in a variety of other statutes[15]. These standardized provisions were enacted in 1971[16] as a result of a recommendation of the Report of the Royal Commission Inquiry into Civil Rights[17]. The commission was appointed to examine the laws of Ontario to determine the extent to which they unfairly encroached upon "the personal freedoms, rights and liberties" of the Ontario population[18].

In examining the investigatory powers conferred on certain civil servants by a variety of statutes, the commission expressed concern over the lack of safeguards to protect the privacy of persons who were obliged by statute to provide information to the government, either on a routine basis or when they were the subjects of investigations authorized by statute[19].

In its report the commission stated:

It is essential that the use of information and evidence obtained through the exercise of statutory powers of enquiry should be confined to the purpose for which it was obtained and that purpose only[20].

In explaining the problem, the commission continued:

Broadly speaking, statutory enquiries, other than inquests or public enquiries, are held in aid of the administration of a statute. Statutes authorizing such enquiries should contain adequate safeguards to insure that the information obtained by the exercise of the investigative power is not used for any other purpose. Disclosure of information to unauthorized parties could well cause great hardship, e.g. disclosure of business or trade secrets. Even disclosure to other government departments or agencies should be prohibited[21].

It seems manifestly unfair that an individual who gives information at a departmental investigation should have to be on his guard throughout lest he disclose matters that may be quite irrelevant to the investigation underway, but at the same time be useful to another department of government, or to an opposite party in civil litigation. We think that, apart from disclosure in the courts, information obtained through departmental enquiries authorized by statute should

not be disclosed, except in so far as it may be necessary for the proper administration of the act conferring the authority to investigate[22].

In the result, the commission recommended:

There should be a statutory prohibition on the communication of information obtained in a statutory investigation beyond the purposes of the relevant statute and the administration of justice[23].

However, the amendments to the statutes as written do not limit the duty to preserve secrecy of information obtained through departmental inquiries. In fact, the statutory language covers "all matters," including, presumably, government reports, studies and policy development background papers, as well as administrative guidelines, directives and manuals. Furthermore, although some statutes restrict the application of the secrecy provision to inspectors and investigators acting under the authority of the statute, many others extend coverage to "every person employed in the administration of this Act." Of course, in cases where the statutory secrecy provision only applies to investigators or inspectors, other civil servants in the administration would still be subject to a secrecy oath.

It should be noted, however, that even without such express statutory provisions, information which relates to internal administrative practices and policies has traditionally been considered within the secrecy prerogative of the Crown. It seems clear, then, that the real intention of these provisions is to protect from public disclosure information supplied to the government by private parties. However, the language goes well beyond whatever might be required to achieve this purpose.

Moreover, an examination of the various statutes illustrates that the desirability of protecting the privacy of those who are subject to government inquiries or investigation has given way to other, more important public interests on occasion. However, this has occurred ad hoc and not as a result of any clear policy outlining the priority of interests to be protected. A few examples will illustrate this point.

The Business Practices Act[24] creates a statutory cause of action enabling consumers who are the victims of "unfair" or "unconscionable" trade practices to sue for damages for breach of the act. The act contains the standard form secrecy provision which applies to every person engaged in its administration. However, a fourth exception is made to permit government employees to communicate information obtained in the course of their duties:

to inform the consumer involved of an unfair practice and of any information relevant to the consumer's rights under this Act[25].

Under The Occupational Health and Safety Act, 1978[26] the reports of inspectors, who are charged with ensuring that employers conform to government regulations respecting the health and safety of workers, must be made available to the workers as well as to the employer.

By contrast, under The Building Code Act[27] and The Nursing Homes Act[28] for example, the reports of inspectors who are equally charged with ensuring public safety are considered to be "matters confidential" between the government and the builder or nursing home operator.

Under The Environmental Protection Act[29], provincial officers who are authorized to carry out tests and examinations of the natural environment are obliged to keep secret all matters that come to their knowledge in the course of their duties except

...information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment[30].

This kind of information may be disclosed to the public.

Strict secrecy provisions apply in the case of many licensing statutes, such as The Motor Vehicle Dealer Act[31], The Collection Agencies Act[32], The Real Estate and Business Brokers Act[33], and The Insurance Act[34], presumably on the rationale that the kind of financial and other information which must be supplied to the government as a condition of licensing should be treated as confidential. For the same reason, strict secrecy is legislated under taxing statutes. Under section 166 of The Corporations Tax Act[35], for example, where information collected by the Ontario government may be shared with other provincial or federal authorities by inter-governmental agreement, the standard requirement of secrecy is extended to cover anyone "employed in the service of Her Majesty."

On the other hand, The Family Benefits Act[36], which requires applicants for financial assistance to supply a great deal of financial and other personal information which may be communicated to other government agencies, contains no secrecy provision at all.

## GOVERNMENT ORDERS

Similar inconsistencies appear in other areas of government. Under The Business Practices Act, the Director has power to issue cease and desist orders against businesses he finds to be engaging in "unfair" and "unconscionable" trade practices. By law, these orders must be made public[37]. A similar power is invested in the Superintendent of Insurance under The Insurance Act, where he finds an insurer engaging in "unfair or deceptive" practices[38]. However, there is no requirement that such orders be made public. The Superintendent has sole discretion to decide who should be informed other than the insurer itself[39].

## CROWN PRIVILEGE

Under existing law, the most serious challenge to the legal right of the government to preserve its tradition of secrecy arises in the context of court proceedings. One of the basic principles of our legal system is that the courts, in order to reach a just resolution of disputes, must be able to hear and consider all relevant evidence. For this reason, the court is empowered to compel the production of material and the attendance at trial of any witness who possesses information relevant to the matter in dispute. The court's power to compel production of oral or documentary evidence is based on the principle that the public interest in the due administration of justice outweighs any private interest in confidentiality[40].

At common law, however, the Crown possessed the prerogative right to refuse to produce documentary or testimonial information to the court[41]. When the Crown was a party to the litigation, this prerogative was reflected in its immunity from discovery by the opposite party, which will be discussed below. When government-held information was sought in court proceedings to which the Crown was not a party, it could still refuse to produce information on the ground that its disclosure would be detrimental to the public interest. Although the Crown's common-law immunity from discovery has now been modified by The Proceedings Against the Crown Act, this statute expressly preserves the right of the Crown to refuse to disclose where it would be "injurious to the public interest"[42].

The prerogative right of the Crown to withhold information from the courts is traditionally called "Crown privilege," although many commentators have noted that this is inaccurate: the requirement that the public interest be protected, unlike other privileges, cannot be waived, and a court has a duty to enforce the right on its own motion. "The essential condition of the claim is that there be a public interest recognized as

overriding the general principle that in a court of justice every person and every fact must be available to the execution of its supreme function"[43]. Therefore, when a claim of Crown privilege is raised in court proceedings, the public interest in the administration of justice may conflict with the public interest which the Crown asserts would be harmed by public disclosure of the information required by a litigant.

As the case law on Crown privilege illustrates[44], an assertion of this right to withhold evidence from a court is usually argued on the ground that disclosure would harm the security of the nation or interfere with the conduct of international relations or damage the effective operation of the public service. The Crown has often succeeded in claiming immunity for classes of documents, regardless of their specific content, on the ground that disclosure would discourage candour in communications within government departments and between government and outside sources. It is said that the loss of confidentiality for these communications would gravely hamper the government in carrying out its responsibilities.

Under the rubric of Crown privilege, then, a wide variety of government-held information may be withheld from the court, and therefore from the public domain. In some early cases, a bald assertion of the "candour" argument was accepted as conclusive by some courts; but in more recent decisions the courts have cast doubt on the validity of this claim. Although the law on Crown privilege is not consistent, a line of Canadian cases[45], especially after the English decision in Conway v. Rimmer[46], suggests that the courts will not treat a minister's affidavit (by which the claim of Crown privilege is asserted and the existence of a threat to the public interest declared) as conclusive on the question of harm to the public interest. Instead, the court will itself decide this question and may examine the documents in camera to assess the validity of a minister's assertion.

There appears, then, to be a trend towards narrowing the scope of the claim of Crown privilege and in favour of judicial scrutiny of its substance. The high point to date of this trend was reached in the Australian case, Sankey v. Whitlam[47], in which the High Court ordered the production of documents and materials, including notes relating to Cabinet deliberations and policy memoranda from senior officials to ministers.

In Canada, at the federal level, the developing common law was codified in the Federal Court Act[48] which expressly permits the court to assess the validity of a minister's claim of Crown privilege by examining the documents in camera. If, however, the minister certified by affidavit that the disclosure of the

material in question would be injurious to national defence or security, international relations, or federal-provincial relations, or would reveal a Cabinet confidence, then "discovery and production shall be refused without any examination by the court"[49].

#### Recent Proposals for Change in the Law of Crown Privilege

In its 1976 Report on the Law of Evidence, the Ontario Law Reform Commission recommended that the law of Crown privilege in Ontario be clarified by amendments to The Ontario Evidence Act similar to section 41 of the Federal Court Act[50]. It was the view of the commission that the common-law rules of Crown privilege formulated for other conditions were no longer appropriate:

Executive silence and the degree of secrecy afforded to affairs of government are matters of general political concern. This is particularly true today when government functions extend far beyond the regulation of matters of external and internal security and foreign relations. Governmental expansion into virtually every area of social activity, into areas of commerce, industry and welfare, to name only a few, together with the increasing role played by government in public administration through tribunals and investigatory bodies, have created conditions far removed from those prevailing when the common law principles concerning executive privilege were first formulated. The questions that arise under these modern conditions are very remote from questions of disclosure relating to peace and war and national security. Conflicting public interests must be balanced: "there is a public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is a public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done". The question is who should hold the balance and how should it be held[51].

The amendments to the Ontario Evidence Act proposed by the commission expressly provide for court review of a minister's claim of Crown privilege, except where the disclosure of the information sought would be injurious to the security of Ontario or Canada or to federal-provincial relations, or would disclose a Cabinet confidence. It was the view of the commission that claims of Crown privilege based on these grounds should be unreviewable by the court. However, the commission also recommended that:

...because the proposed scheme would broaden the range of matters in respect of which Crown privilege may be claimed absolutely, without intervention by the courts, additional safeguards are required against the unwise and arbitrary exercise of the privilege. We recommend, therefore, that a decision as to whether executive privilege should be claimed on any of the grounds on which, under our recommendations, a claim for unreviewable privilege may be based, should be made not by a minister alone, but collectively by the Executive Council[52].

The Law Reform Commission of Canada has taken a different position on the question in its Draft Evidence Code[53]. In its view, all claims of Crown privilege should be subject to review by the courts. Section 43 of the draft code expressly allocates to the courts the responsibility for assessing the validity of executive claims of privilege in court proceedings and establishes a procedure whereby claims involving state secrets may be heard by a judge of the Supreme Court of Canada at the request of the presiding judge or the Crown. However, at present in Ontario any claims of privilege made by the Crown in right of Ontario continue to be subject to the common-law developments discussed above.

#### Discovery Against the Crown: Civil Proceedings

Discovery is the procedure in civil litigation by means of which litigants are able to inform themselves of the evidence on which the opposing party intends to rely at trial. The opposite party is examined under oath, and access is granted to documentary or other information in the possession of the opposite party before the trial. At common law, the Crown as a party to litigation was immune from discovery. This immunity has now been modified in Ontario by The Proceedings Against the Crown Act, which obliges the Crown to submit to discovery as if it were a corporation[54]. The Deputy Attorney General and the Deputy Minister of Justice must designate the person who will attend on an examination for discovery. However, the act retains the doctrine of Crown privilege by permitting the Crown to refuse to produce a document or answer a question on discovery on the ground that disclosure would be "injurious to the public interest"[55]. This claim is subject to the developing common law on Crown privilege. An aggrieved party may bring a motion before the court for an order compelling the Crown to answer. At this point, the court must decide in accordance with common-law developments whether the claim is to be upheld. However, there are other statutory provisions which may be relied on in proceedings to which the Crown is not a party, where the success of a claim of Crown privilege may be in doubt.

## Statutory Secrecy Provisions

The widespread use of express secrecy provisions in Ontario statutes has been discussed earlier. The duty to preserve secrecy imposed on civil servants is, as a general rule, subject to three exceptions. One of these allows civil servants to disclose information

...as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations[56] [emphasis added]

Clearly, the intention is to allow for disclosure by civil servants through testimony in court proceedings -- but only in respect of proceedings brought under the statute in question. It is not clear whether a civil servant could rely on this provision to avoid giving evidence in a proceedings not brought under the particular act. In Homestake v. Texasgulf Potash Company[57], which involved a dispute over royalties between two private companies, a similarly worded statutory provision was relied on by the government in attempting to refuse to produce a government employee who had been subpoenaed by the plaintiff. The court ordered that the evidence be given. It was held that because the information requested by the plaintiff involved matters which were "of public knowledge and in respect of which no question of privacy or confidentiality [arose]," it was not the type of "information" that the provision was directed at protecting. The Homestake case suggests that, although the secrecy provision may be conclusive with respect to some matters, the court will decide whether the information sought by a litigant from the Crown is of the kind covered by the provision.

## Non-Compellability and Incompetency

However, even this degree of judicial scrutiny is blocked by statutory provisions, which exist in over forty Ontario statutes, which declare certain government officials to be non-compellable witnesses in any proceedings other than one brought under the act in question. This means that the government official has discretion as to whether to testify; if he decides not to do so, the court cannot review the decision. Many other statutes render certain government employees incompetent witnesses. When this is the case, the government employee has no choice in the matter; he is simply not legally eligible to testify[58].

In summary, although the developing common law of Crown privilege may be making some inroads into the right of the government to withhold information from the court (and therefore from the public domain), much government information may still be withheld by the use of statutory secrecy and non-compellability and non-competency provisions.

Although developments in the law of Crown privilege may be of great advantage to future litigants, public disclosure of government information in court proceedings can have only a marginal, though occasionally spectacular, impact on government secrecy in general. This form of public disclosure occurs only in the context of individual disputes; therefore, information emerges in a piecemeal fashion. While this may be important for litigants, it can hardly be considered a satisfactory method of ensuring a general policy of greater openness in government.

#### Discovery Against the Crown: Criminal Proceedings

Although there is a right of discovery against the Crown in civil matters, subject to a claim of Crown privilege, the rights of accused persons to obtain information about the cases against them prior to trial are much more restricted.

The Criminal Code[59], the federal legislation which largely governs the conduct of criminal proceedings across Canada, makes only limited allowance for pre-trial disclosure to the accused of the Crown's case. For example, an accused charged with treason has the right to receive, before arraignment, a list of the potential jurors and the witnesses to be produced at trial[60]. Other Code provisions permit the accused to obtain, before the trial, copies of any witness statements made at a preliminary hearing[61] and to have access to any exhibits the Crown intends to introduce at trial in order that the accused may carry out his own scientific or other tests[62]. In addition, the accused may bring a motion for further particulars of the charge[63]. However, this is not a device which will effect a full discovery of the Crown's case: the courts have held that a motion for particulars may only be brought for the purpose of clarifying the nature of the charge and does not entitle the accused to disclosure of the evidence to be led at trial by the Crown[64]. Apart from these provisions, unless the accused is entitled to a preliminary hearing, the disclosure of any information to the defence prior to trial is solely at the discretion of the police or the Crown attorney in charge of the prosecution[65].

The preliminary inquiry is a hearing held before a provincial judge or magistrate designed to test the strength of the Crown's case. The prosecution is obliged only to call enough evidence to establish a prima facie case of guilt; that is, enough evidence to put the accused on trial. Although this hearing may serve as a form of discovery for the defence, its usefulness is limited because there is no obligation on the Crown to call all its witnesses or evidence. The Canadian case law is uncertain as to whether a judge presiding at a preliminary hearing has the power to order the Crown to disclose to the accused witness statements made to the police where the Crown chooses not to put them in evidence[66].

A recent study done by the Law Reform Commission of Canada found that pre-trial disclosure practices of Crown prosecutors were not consistent in the three major cities they studied[67]. Some Crown Attorneys, for example, were willing to supply witness statements as well as other information unearthed in investigations which might be helpful to the accused; others refused to provide the defence with any information.

As a result of these findings and other research, the commission proposed that a uniform discovery procedure be adopted for criminal proceedings across Canada. The suggested procedure would require the Crown to disclose to the defence, prior to the trial, the names, addresses and occupations of all persons who provided information to the investigating officers, in order to permit the defence to conduct its own investigation or to follow up leads ignored or neglected by the police. It was the commission's view that such a procedure would redress to some extent the inequality which currently exists between the resources of the individual accused and the vast investigatory machinery available to the state.

#### THE OFFICIAL SECRETS ACT

The federal Official Secrets Act[68] is the "ultimate weapon" in the government's legislative armoury aimed at deterring the release of information: it makes the unauthorized disclosure of government information a criminal offence punishable upon conviction by a maximum of fourteen years imprisonment[69].

The Canadian act is copied from the British Official Secrets Act which was first enacted in 1911; criminal law provisions protecting official secrecy first appeared in both countries in the late nineteenth century. Although the act is popularly viewed as anti-espionage legislation, the deterrence of spying is by no means its only purpose[70]. In the United Kingdom, at any rate,

the continuing problem of information leaks from the civil service and the failure of administrative sanctions to control them, led to the decision to use criminal sanctions against civil servants who made unauthorized disclosures of information[71].

This concern is expressed in section 4(1) of the act:

Every person is guilty of an offence...who, having in his possession or control any secret official code word, or pass word or any sketch, plan, model, article, note, document or information that...has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access...owing to his position as a person who holds or has held office under Her Majesty...

- (a) communicates the code word, pass word, sketch, plan model, article, note, document or information to any person other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;

In short, section 4 makes it an offence to disclose to anyone information obtained as a result of current or former government employment, unless the communication is authorized, or is required in the interests of the state[72]. Although it is a federal act, its prohibitions apply to both federal and provincial government employees[73].

The Official Secrets Act has been subjected to severe criticism in recent years. In 1969, the Mackenzie Royal Commission on Security described it as "an unwieldy statute couched in very broad and ambiguous language"[74]. In the United Kingdom, the Franks Committee referred to the British equivalent of section 4 as a "catch-all" and "a mess"[75]. More recently in Canada, the McDonald Commission, established to inquire into certain activities of the Royal Canadian Mounted Police, has concluded that section 4 is "too wide in that it imposes criminal liability in many unnecessary situations"[76].

What kind of information is caught by the section? There are two possible interpretations of section 4: either the words "secret official" apply to all of the following words, including "sketch, plan...document or information," or they only modify the phrase "code word or pass word." If the first interpretation is correct, then it is said that the act forbids only the disclosure of information which is classified as "top secret" or "secret." On the other hand, if "secret official" modifies only "code word or pass word," and does not refer to the remaining "sketch,

plan...document or information," then the unauthorized disclosure of any information, including official information of a provincial government, no matter how insignificant, could be an offence under the act. This is the interpretation which has been followed in the British courts[77], but the issue remains in doubt in Canada[78]. The requirement of consent from the Attorney General of Canada to initiate prosecutions under the act provides the only brake on prosecutions for trivial breaches[79].

An authorized disclosure of information by a civil servant would not be a breach of the act. Is implied authorization sufficient, or must it be express? There is no definitive answer to this question. Presumably, disclosure of information in accordance with a freedom of information statute would be sufficient "authorization" to avoid a breach of the act. This, at least, is the view taken by the federal government's discussion paper released at the time of the introduction of its bill on freedom of information[80].

Would disclosure of material exempt from access under a provincial freedom of information act be a violation of the Official Secrets Act? At present, the answer of this question depends on which interpretation of section 4 is followed. The McDonald Commission notes that there are no reported cases of prosecutions under the Official Secrets Act for the unauthorized disclosure of information obtained from a provincial government[81], although as noted earlier the act applies to provincial as well as federal government employees.

In its first report, the McDonald Commission recommended that the Official Secrets Act be repealed and that espionage and leakages of government information be dealt with in separate pieces of legislation. As for unauthorized disclosure of government information, the Commission recommended that criminal penalties be retained for disclosure of information relating to security and intelligence (whether or not it is classified) and information the disclosure of which would adversely affect the administration of criminal justice[82]. The McDonald Commission further recommended that the maximum penalty for unauthorized disclosures of this kind of information be reduced from the present fourteen years to six years[83], and that it be a defence to a charge of unlawfully disclosing information relating to the administration of criminal justice that the accused believed, on reasonable grounds, that the disclosure was for the public benefit[84].

These recommendations, if adopted, would clarify the situation with respect to the kinds of information which would attract

criminal penalties for unlawful disclosure, thus correcting the current state of uncertainty. Clearly, provincial government employees who had access to information relating to security and intelligence and the administration of criminal justice, and who disclosed it without authorization, would be subject to the criminal penalties recommended by the Commission.

## B. THE PUBLIC RIGHT TO KNOW

### **PUBLIC RECORDS**

The previous section examined the legal framework within which government secrecy in Ontario is maintained and enforced. This section will describe the extent to which there is legal recognition of a public "right to know." Two basic issues arise here: what kind of information must by law be made public, and what remedies are available to enforce the "right to know"?

#### Information Declared Public by Statute

Of the more than 500 statutes in effect in Ontario, approximately 75 contain provisions which require that certain information be made available to the public[85]. Acts passed by the legislature must be printed, published and distributed[86]. All proclamations of the Lieutenant Governor, including regulations made under statute[87], and all official notices to the public must be published in the Ontario Gazette, the official publication of the Ontario government[88]. Eighty-nine statutes require various government ministries and boards to table annual reports in the legislature[89]. These then become public records.

Debates in the Legislative Assembly are open to the public, as are meetings of legislative select and standing committees. Transcripts of the debates are published in Hansard and a record of the votes and proceedings in the legislature is also published.

At the local government level, formal meetings of local councils must be open to the public and there is a right of public access to the minutes and by-laws of council and certain other books, records and accounts kept by the clerk[90]. Money by-laws and reports of boards of education are available to the public; student records are open to the student and parents[91]. Municipal tax assessment rolls are public records[92].

Proceedings in the courts of Ontario are open to the public[93] and there is a right of public access to the records of

court cases[94]. Significant decisions of the courts are published in the Ontario Reports, under the authority of the Law Society of Upper Canada, and in other law reports.

Most other public information statutes require disclosure of information relating to the private sector. Public records are kept of judgment debtors[95] and undischarged bankrupts[96]. The registers of births, deaths, marriages, divorces and changes of name are public records[97]. The names and addresses of directors and officers of companies licensed to carry on business in Ontario are public records[98]. Certain professional and trade associations must make their governing by-laws publicly available, including dentists, doctors, nurses, optometrists, pharmacists[99], lawyers[100], denture therapists[101], and funeral service operators[102].

Existing rights of public access to government-held information concerning the private sector reflect a predominant concern with providing information in order to regulate and protect property rights and commercial transactions. Notice must be given to the public of certain proposed government or private action which may affect the use or value of land. For example, ministerial orders establishing planning areas in Ontario must be laid before the legislature, and the public must be given prior notice of any public hearings to be held as well as the opportunity to inspect the plans[103]. The Environmental Assessment Act requires that the public be given notice of and access to environmental impact studies of proposed private or government undertakings[104]. Public notice must be given of sidewalk and sewer improvements and special assessment rolls[105]. Ownership of land in Ontario is also a matter of public record[106].

#### Decisions and Orders of Government Tribunals

Our research study indicates that only the Criminal Injuries Compensation Board, the Liquor Licensing Board and the Commercial Registration Appeal Board are required by statute to publish their decisions and summaries of reasons[107]. Fewer than ten agencies must by law make their "orders" public[108]. While most government tribunals hold their hearings in public, they do have discretion to sit in camera, in which case the public would not have access to information disclosed at the hearing[109].

This survey of public information laws is not exhaustive. However, it does serve to illustrate how the present recognition of a public right to know reflects nineteenth-century notions about the structure of government. Thus, the public right to scrutinize the actions of the legislature and the courts is well

established. Few today would question that the public has the right to know the laws that are made and how they are applied. However, many of the activities of the administrative branch of government, which is of relatively recent growth and which performs functions similar to both the courts and the legislature, remain hidden from public view.

### Enforcing Statutory Rights to Information

The statutes discussed above place legal duties on government officials to make certain information available to the public. The traditional legal means of compelling the performance of a public legal duty is an order of mandamus, which is a royal command issued in the name of a superior court ordering the performance of the duty. Failure to obey an order of mandamus is contempt of court, punishable by imprisonment[110].

However, the granting of an order of mandamus is within the discretion of the court and it may refuse the application on a variety of grounds. First, the applicant must show that he has standing; as a general rule, this requires that the applicant show a direct and substantial personal interest in the performance of the duty, over and above the general public interest in the due performance of public legal obligations. Mandamus, then, may not be available to compel disclosure of information unless the applicant can show he is affected by the wrongful withholding in a personal and substantial way. Mere curiosity or the desire to enforce a public right on behalf of the general public would probably not be a sufficient "special interest" to satisfy the standing requirement.

A second major difficulty with mandamus as a remedy in this context is that it does not lie against the Crown. The Crown cannot order itself to do something. Thus, unless the statute imposes the duty to make information public on a named civil servant, as in "the director shall..." or "the minister shall ...," mandamus will not generally lie.

Even if these two major obstacles are overcome, the court may still refuse to make the order on the grounds that there are alternative remedies available to the applicant, or that there has been unreasonable delay in bringing the application, or that the applicant's motives are improper, such as the desire to advance his own pecuniary interest.

In summary, then, even though there does exist in Ontario a legal obligation on government to make certain information

publicly available, in many cases it may be impossible to enforce this obligation in the courts. The legal remedy of mandamus may serve in individual cases, but it is of doubtful utility in enforcing even the limited general public right to know which exists at present. Unless some "special interest" can be shown by applicants, the wrongful withholding of information must be dealt with in the political arena, if at all.

#### ADJUDICATION: THE RULES OF NATURAL JUSTICE

Does a person whose rights or liberty are directly affected by the decisions of government agencies have a right to know the information on which those decisions will be based? The answer to this question may be found both in Ontario statute law and in the common-law rules of natural justice.

The rules of natural justice provide procedural standards for fair decision making. They were first developed and applied in court proceedings, but with the growth of the administrative branch of government, their application has been extended by the courts to certain government officials and agencies which are empowered by statute to take actions affecting individual rights and liberties[111]. The two basic rules are that:

1. no one shall be a judge in his own cause (the rule against bias);
2. no one shall be penalized unheard.

Both rules are important, but it is the right to be heard which is of greater significance in the context of access to information by a person who will be affected by a decision of a public authority. If a person has a right to be "heard," then he must be informed of the case he has to meet in order that he may answer it; without adequate information, the right to a "hearing" would be meaningless. The failure of a government decision maker to abide by this procedural safeguard will be a breach of natural justice and grounds for the reviewing court to quash the decision.

Under what circumstances does the right to be heard arise? What procedure must be adopted to give effect to this right? These are two of the most difficult questions in this area of the law. The technique most frequently used by the courts to answer the first question has been to classify the governmental action in question as "judicial" or "quasi-judicial" if it resembles the kinds of decisions made by courts of law (in which case the rules of natural justice apply), or as "administrative" (in which case they do not). However, this approach has never been entirely

satisfactory. Such distinctions are extremely difficult to articulate in conceptual terms, and in practice they can result in the denial of procedural due process in cases where the government action may have very serious consequences for the person affected[112].

The recent development by the courts of the notion of a duty to act "fairly" appears to offer a way out of the conceptual muddle presented by the judicial/administrative distinction. Recent cases show the courts using this doctrine to reach government actions which, under the traditional approach, would have been viewed as free of any requirements of procedural fairness[113]. The scope of this new duty is still evolving: some cases treat the duty to act fairly as the "new natural justice," while others suggest it is a separate and lesser obligation applicable only where purely "administrative" powers are in question[114]. Furthermore, the procedural content of the duty to act fairly or the rules of natural justice cannot be stated with any precision.

This uncertainty about the application of the rules of natural justice was considered by the Ontario Royal Commission Inquiry into Civil Rights (1968)[115]. The Statutory Powers Procedure Act (SPPA) of 1971 followed the recommendations of that commission. The act sets out a procedural code to be followed by tribunals who are required to hold a formal hearing, either under statute or "otherwise by law," prior to making a decision[116]. The procedural requirements resemble those of a court of law, including the right to representation, to call evidence, to cross-examine witnesses, and to receive the decision with reasons in writing if requested.

Under The Statutory Powers Procedure Act, then, the disclosure of information on which the tribunal will base its decision takes place in the context of a formal, trial-like hearing. If a party's "good character, propriety of conduct or competence" are in issue, then the tribunal must provide him with "reasonable information of any allegations with respect thereto" prior to the hearing[117].

The Civil Rights Law Amendment Act was also passed in 1971 to define the procedural obligations of existing government decision makers[118]. The number of tribunals required to hold formal hearings was increased; in some cases, their obligations to disclose information were expanded to include a duty to provide pre-hearing access to the actual documentary and other material to be used at the hearing. There are now approximately thirty-seven tribunals which must meet this obligation of pre-hearing disclosure of actual evidence, which goes beyond what is required

under the SPPA. Statutes passed since 1971 which create new decision-making powers for government officials or tribunals generally specify whether a hearing is required, or what procedural obligations apply short of a formal hearing, often expressly excluding the application of the SPPA procedural code.

The result of this legislative activity has been the creation of a variety of procedural rights and obligations. The rights of a person subject to the decisions of government officials or tribunals to have access to the information on which the decision will be based varies from statute to statute, depending on whether a formal hearing is required. Under some statutes[119], an initial decision may be made without the person affected having access to any of the information collected by the decision maker: limited rights of access arise only if the first decision is appealed, thereby triggering the right to a formal hearing.

However, this legislative regime has not eclipsed the common law. In some recent cases, the denial of access to information has been held by the courts to be a breach of natural justice, even where the governing statute did not require a formal hearing[120].

Nevertheless, even though the courts appear to be imposing the obligations of natural justice on a wider range of government authorities, they continue to be reluctant to lay down universal rules as to the procedural content of these obligations. The duty to inform a person of the case against him may be fulfilled in a variety of ways depending on the circumstances of the case. In some cases, informal discussions with the person may be sufficient. In others, written notice and the opportunity to make submissions in writing may be required. Still others may require the decision maker to hold a formal hearing, which usually includes the right of the person to have legal representation and to call and cross-examine witnesses. However, at common law, as long as the person is informed in some way of the "gist" of the case he has to meet, the requirements of natural justice will be satisfied. The right to examine the actual documentary or other evidence on which the decision maker will act has never been held to be a fundamental part of natural justice in the administrative law context, although in individual cases the courts may hold that denial of this information is a breach of natural justice.

The absence of certainty and predictability of the procedural content of natural justice reflects the inherent conflict faced by the courts in attempting to find a proper balance between their perceived responsibility to ensure that government decision makers act fairly, and their duty not to interfere with the legitimate exercise of government's legislative powers by imposing adjudica-

tive procedures on all administrative action[121]. This is especially so in the area of access to information: the court may be more willing to defer to government claims of the need for confidentiality of information in this context than when it is raised in court proceedings. As a result of this inherent conflict, it continues to be difficult to predict when the common-law right to notice includes a party's right to have access to the actual documentary or other evidence on which a decision will be based.

## CHAPTER 7 NOTES

- 1 This chapter is based on T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979), cited hereafter as Brown.
- 2 R.S.O. 1970, c. 386.
- 3 Ibid., s. 10.
- 4 Ontario Legislative Assembly, Debates, 1947, at 949, 1037, 1090.
- 5 Address by Honourable J.C. McRuer, Conference on Law and Contemporary Affairs, University of Toronto, February 3, 1979.
- 6 A government employee who showed documents concerning himself and his employment situation to the Civil Service Association in order to seek advice about a possible grievance was dismissed for this breach of the oath. A hearing board ordered that he be reinstated on the ground that this type of disclosure was not substantial enough to warrant dismissal: Brown, 17-18. At that time, the oath permitted disclosures which were "legally authorized or required." A few months later, the Act was amended to delete the word "authorized": S.O. 1961-62, c. 121.
- 7 Anonymous leaking of information to the press, the opposition, and public interest groups suggests that such internalization is not universal within the civil service.
- 8 Cancer Remedies Act, R.S.O. 1970, c. 56; Crown Employees Collective Bargaining Act, S.O. 1972, c. 67; Election Act, R.S.O. 1970, c. 142; Labour Relations Act, R.S.O. 1970, c. 232; Legal Aid Act, R.S.O. 1970, c. 239; Legislative Assembly Act, R.S.O. 1970, c. 240; Ministry of Treasury, Economics and Intergovernmental Affairs Act, S.O. 1972, c. 124; Ombudsman Act, S.O. 1975, c. 42; Ontario Land Corporation Act, S.O. 1972, c. 134; Private Sanitarium Act, R.S.O. 1970, c. 363; Statistics Act, R.S.O. 1970, c. 443; Vital Statistics Act, R.S.O. 1970, c. 483; Registry Act, R.S.O. 1970, c. 409 in Reg. No. 777, R.R.O. 1970 Forms 2 and 3.

- 9      The Labour Relations Act, R.S.O. 1970, c. 232, s. 91(8).
- 10     The Ombudsman Act, S.O. 1975, c. 42, s. 13(2).
- 11     R.S.O. 1970, c. 363.
- 12     Ibid., s. 3(6).
- 13     For the complete text, see F.F. Schindeler, Responsible Government in Ontario (Toronto: University of Toronto Press, 1969).
- 14     The Ambulance Act, R.S.O. 1970, c. 20, s. 18(3) as amended by S.O. 1971, Vol. 2, c. 50, s. 5(10).
- 15     For a complete list, see Brown.
- 16     The Civil Rights Law Amendment Act, S.O. 1971, Vol. 2, c. 50.
- 17     Ontario, Report of the Royal Commission Inquiry into Civil Rights (Toronto: Queen's Printer, 1968), cited hereafter as McRuer Report.
- 18     Ibid., 1.
- 19     Ibid., 458-462.
- 20     Ibid., 458.
- 21     Ibid.
- 22     Ibid., 461.
- 23     Ibid., 462.
- 24     S.O. 1974, c. 131.
- 25     Ibid., s. 14.
- 26     S.O. 1978, c. 83.
- 27     S.O. 1974, c. 74.
- 28     S.O. 1972, c. 11.
- 29     S.O. 1971, Vol. 2, c. 86 as amended.
- 30     Ibid., s. 87(1).

- 31 R.S.O. 1970, c. 475.
- 32 R.S.O. 1970, c. 71.
- 33 R.S.O. 1970, c. 401.
- 34 R.S.O. 1970, c. 224.
- 35 S.O. 1972, c. 143.
- 36 R.S.O. 1970, c. 157.
- 37 S.O. 1974, c. 131, s. 5(c).
- 38 R.S.O. 1970, c. 224, s. 391.
- 39 Ibid.
- 40 The privilege afforded to communications between client and solicitor or between husband and wife are two exceptions to the rule.
- 41 This right stems from the fact that the Crown is the ultimate source of the power vested in the executive and the judiciary.
- 42 R.S.O. 1970, c. 365, s. 12(a).
- 43 R. v. Snider [1954] S.C.R. 479 at 480; [1954] 4 D.L.R. 486 at 487 (Rand, J.).
- 44 See S. Lederman, "The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest," (1973) 8 U.B.C.L.J. (No. 2), 272; S.O. Bushnell, "Crown Privilege," (1973) 51 Can. Bar. Rev. 551.
- 45 Re Blais and Andras (1973) 30 D.L.R. (3d) 287 (F.C.A.); Gagnon v. Quebec Securities Commission [1965] S.C.R. 73, 50 D.L.R. (2d) 329; R. v. Snider [1954] S.C.R. 479 [1954] 4 D.L.R. 483; Homestake Mining v. Texasgulf Potash (1977) 76 D.L.R. (3d) 521 (Sask. C.A.); Manitoba Development Corp. v. Columbia Forest Products Ltd. [1973] 3 W.W.R. 593 (Man. Q.B.); Huron Steel Fabricators v. MNR (1973) 31 D.L.R. (3d) 110 (Fed. Ct. Trail Div.).
- 46 [1968] A.C. 910.

47 [1978] 53 A.L.J.R. 11.

48 R.S.C. 1970, c. 10 (2nd Supp.).

49 Ibid., s. 41(2).

50 Ontario Law Reform Commission, Report on the Law of Evidence (Toronto: Ministry of the Attorney General, 1976) 232.

51 Ibid., 221.

52 Ibid., 232.

53 Law Reform Commission of Canada, Report on Evidence (Ottawa: Information Canada, 1975) 82.

54 R.S.O. 1970, c. 365, s. 12.

55 Ibid., s. 12(a). The 1968 Royal Commission Inquiry into Civil Rights recommended the repeal of this provision. It was the commission's view that it went beyond the common-law rules of Crown privilege applicable at trial. See McRuer Report, Vol. 5, 2213-14.

56 The Ambulance Act, R.S.O. 1970, c. 20 as amended.

57 (1977) 76 D.L.R. (3d) 531 (Sask. C.A.).

58 For a complete list of statutes, see Brown.

59 R.S.C. 1970, c. C-34.

60 Ibid., s. 532.

61 Ibid., s. 531.

62 Ibid., s. 533.

63 Ibid., s. 516.

64 R. v. McGavin Bakers (1950) 99 C.C.C. 330, 11 C.R. 227; R. v. Imperial Tobacco (1940) 73 C.C.C. 18 [1940] 1 W.W.R. 124.

65 R. v. Lantos [1964] 2 C.C.C. 52, 42 C.R. 273 (B.C.C.A.); R. v. Lalonde (1971) 5 C.C.C. (2d) 163, 15 C.R.N.S. 1 (Ont. S.C.).

- 66 R. v. Imbery (1961) 35 W.W.R. 192 (Alta. S.C.) (mandamus issued to compel magistrate to order production of complainant's statement to police at preliminary inquiry into rape charge); R. v. Littlejohn [1972] 3 W.W.R. 475 (Man. Mag. Ct.) (accused entitled to production of statements to ensure a fair hearing in accordance with the Canadian Bill of Rights); R. v. Harbison (1972) 20 C.R.N.S. 336 (B.C. Prov. Ct.) (the magistrate has discretion to order production of witness statements at a preliminary inquiry); Re Regina and Montfils (1971) 4 C.C.C. (2d) 163, [1972] 1 O.R. 51 (Ont. C.A.) (a provincial court judge presiding at a preliminary inquiry has power to order a police officer to produce notes from which he refreshed his memory prior to testifying); R. v. Doyle (1976) 29 C.C.C. (2d) 177 (S.C.C.) (the jurisdiction of a magistrate presiding at a preliminary inquiry is limited to the provisions of the Criminal Code -- he has no inherent jurisdiction to order production).
- 67 Law Reform Commission of Canada, Discovery in Criminal Cases: Study Report (Ottawa: Information Canada, 1974).
- 68 R.S.C. 1970, c. 0-3.
- 69 Ibid., s. 15(1).
- 70 Section 3 is directed at "spying," according to the marginal notes to the statute, but it was used against anti-nuclear protesters in England, who approached a military airfield with the intention of immobilizing it by non-violent sabotage; Chandler v. DPP [1964] A.C. 763. See S.A. de Smith, Constitutional and Administrative Law, 3rd ed. (Harmondsworth: Penguin Books Ltd., 1977) 471-473.
- 71 Report of the Department Committee on Section 2 of the Official Secrets Act 1911 (the Franks Committee) (1972; Cmnd. 5104) 23-25, cited hereafter as Franks Committee Report.
- 72 The Franks Committee calculated that section 2 (in Canada, section 4) created more than 2,000 possible offences.
- 73 Section 2(1) defines "office under Her Majesty" as including any office or employment held under any provincial government or any board, commission or other body which is the agency of a provincial government.
- 74 Report of the Royal Commission on Security (Ottawa: Queen's Printer, 1969) para. 204.

- 75      Franks Committee Report, 14.
- 76      Commission of Inquiry Concerning Certain Activities of the RCMP (McDonald Commission), First Report: Security and Information (Ottawa: Minister of Supply and Services, 1979).
- 77      Franks Committee Report, 116.
- 78      See R. v. Boyer (1946) 94 C.C.C. 195; R. v. Biernacki (1962) 37 C.R. 226; R. v. Toronto Sun Publishing Ltd. (1979) 24 O.R. (2d) 621. Canadian courts have tended to assume that the Act only prohibits the unauthorized disclosure of classified information. For a fuller discussion of the Official Secrets Act, see M.L. Friedland, National Security: The Legal Dimensions (Ottawa: Minister of Supply and Services, 1980). This study was prepared for the McDonald Commission.
- 79      R.S.C. 1970, c. 0-3, s. 12.
- 80      President of the Privy Council, "Freedom of Information Legislation," October 24, 1979, 30.
- 81      McDonald Commission, First Report, 36.
- 82      Ibid., 23-25. For example, disclosures which would adversely affect the investigation of criminal offences, the gathering of intelligence on criminal organizations or individuals, the security of prisons or reform institutions, or which might be helpful in the committing of criminal offences.
- 83      Ibid., 33. The maximum penalty in Britain for this offence is two years.
- 84      Ibid., 25.
- 85      For a complete list, see Brown.
- 86      The Statutes Act, R.S.O. 1970, c. 446.
- 87      The Regulations Act, R.S.O. 1970, c. 410.
- 88      The Official Notices Publication Act, R.S.O. 1970, c. 303.
- 89      For a complete list, see Brown, Appendix J, 337.
- 90      The Municipal Act, R.S.O. 1970, c. 284.
- 91      The Education Act, S.O. 1974, c. 109.

- 92    The Assessment Act, R.S.O. 1970, c. 32.
- 93    With certain exceptions, such as proceedings involving juveniles.
- 94    The Judicature Act, R.S.O. 1970, c. 228. Adoption records are an exception.
- 95    The Creditor's Relief Act, R.S.O. 1970, c. 97.
- 96    The Bankruptcy Act, R.S.C. 1970, c. B-3 (federal legislation).
- 97    The Vital Statistics Act, R.S.O. 1970, c. 483.
- 98    The Corporations Information Act, S.O. 1976, c. 66.
- 99    The Health Disciplines Act, S.O. 1974, c. 47.
- 100   The Law Society Act, R.S.O. 1970, c. 238.
- 101   The Denture Therapists Act, S.O. 1974, c. 34.
- 102   The Funeral Services Act, S.O. 1976, c. 83.
- 103   The Ontario Planning and Development Act, S.O. 1973, c. 51.
- 104   S.O. 1975, c. 69.
- 105   The Local Improvements Act, R.S.O. 1970, c. 255.
- 106   The Registry Act, R.S.O. 1970, c. 409; The Land Titles Act, R.S.O. 1970, c. 234.
- 107   Compensation for Victims of Crime Act, S.O. 1971, c. 51; Liquor License Act, S.O. 1975, c. 40; Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c. 113.
- 108   Of these, the most notable are orders made under The Business Practices Act, S.O. 1974, c. 131; The Occupational Health and Safety Act, S.O. 1978, c. 83; and The Securities Act, R.S.O. 1970, c. 426.
- 109   See Brown, 35.

- 110 See generally, S.A. de Smith, Judicial Review of Administrative Action 3d. ed. (London: Sweet and Maxwell, 1973); D.S. Mullan, Administrative Law: Title 3, Vol. 1 C.E.D. 3d ed. (Toronto: Carswell, 1979); H.W.R. Wade, Administrative Law, 3rd ed. (Oxford: Clarendon Press, 1971).
- 111 See generally Paul Jackson, Natural Justice (London: Sweet and Maxwell, 1977); S.A. de Smith, Constitutional and Administrative Law; H.W.R. Wade, Administrative Law; D.J. Mullan, Administrative Law; D.J. Mullan, "Fairness: The New Natural Justice?" (1975) U.T.L.J. 281; M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) U.T.L.J. 215.
- 112 See, for example, the parole board cases: Ex parte McCaud [1965] 1 C.C.C. 168 (S.C.C.); Ex parte Beauchamp [1970] 3 O.R. 607 (Ont. H.C.); Howarth v. National Parole Board (1974) 18 C.C.C. (2d) 385 (S.C.C.).
- 113 Nicholson v. Halidmand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671; Inuit Tapirisat of Canada v. Leger (1978) 95 D.L.R. (3d) 665 (F.C.A.); Re Webb and Ontario Housing Corporation (1979) 22 O.R. (2d) 257 (Ont. C.A.); Re Abel and Advisory Review Board (1979) 24 O.R. (2d) 279 (Ont. H.C.).
- 114 Cf. Abel and Webb; see also D.J. Mullan, "Fairness: The New Natural Justice?" and M. Loughlin, "Procedural Fairness."
- 115 McRuer Report, Vol. 1, 206-23.
- 116 S.O. 1971, c. 47, s. 3(1).
- 117 Ibid., s. 8.
- 118 S.O. 1971, c. 50.
- 119 For example, The Family Benefits Act, R.S.O. 1970, c. 157 as amended; The Workmen's Compensation Act, R.S.O. 1970, c. 505, as amended.
- 120 Re Downing and Graydon (1979) 21 O.R. (2d) 292 (Ont. C.A.). But see Abel v. Advisory Board (1979) 24 O.R. (2d) 279 (Ont. High Ct.) (advisory board must act fairly and therefore consider the request for direct access to medical reports -- but it is not obliged to disclose at or prior to the hearing).
- 121 See Loughlin, "Procedural Fairness."



## CHAPTER 8

# Information Practices of the Ontario Government

### INTRODUCTION

In this chapter we discuss the information practices of several branches of government in Ontario, both provincial and municipal. This is to give a broad, general picture: more detailed information about particular government institutions can be found in our published research studies, on which much of this chapter is based.

Although we examine, in accordance with the terms of our mandate, the communication policies and practices currently followed by the Ontario government in dissemination of information which it has decided to circulate to the public, we should state at the outset that this chapter focuses on an examination of the extent to which Ontario residents are given access to the broad range of government information which is not required by law to be made public, and which is not normally distributed through the communications program of the government.

Although the issue of individual privacy will be touched on in this chapter, our discussion here does not deal with the collection and use by the government of personal information about individuals in Ontario. A description and assessment of Ontario government practices in this area appears in Chapter 27 of Volume 3. We are here chiefly concerned with the issue of public access to information which may reveal the internal workings of government in the course of administering existing programs, deciding rights, developing new policies and programs and generally carrying out its public responsibilities. Although it was not possible for us to examine every ministry, branch, agency and board, nevertheless we believe that on the basis of the findings of our research studies it is possible to make some generalizations about information practices in the Ontario government.

There appears to be no overall general policy in Ontario governing public access to information. Each branch, agency or institution determines for itself what information it will make available to the public and what information it will withhold. This decision is often based on a senior official's assessment of the legitimacy of the requester's reason for seeking the information. This practice frequently results in inconsistent treatment within government of similar kinds of information and in unequal

access to information among various groups and individuals outside government. As will be seen, this broad generalization applies to all kinds of information, ranging from documents produced in the course of policy making at the highest levels of government to statistical or other factual data collected in the course of the day-to-day administration of government programs; in addition, it applies not only to information contained in records in current use, but also to information which is mainly of historical interest.

We will also describe the variations with respect to access to information about government adjudication -- not only by members of the general public but also by those whose rights or obligations are directly affected by these decisions.

The information practices at the local government level in Ontario are briefly discussed. We have found substantial variation from community to community with respect to the extent of public access granted to information concerning the activities of municipal government bodies.

#### A. THE FORMULATION OF PUBLIC POLICY

It is useful to begin with a brief overview of the way in which public policies are formulated by ministry staff, the Cabinet, and the Legislature in Ontario[1]. The kinds of information which may be generated in the course of this process, and current government practices with respect to public access to this information, are described.

##### THE MINISTRY LEVEL

Pressure for a government policy decision on a particular issue may come from a variety of sources both inside and outside the government. Once an issue has been identified as requiring some government action, most of the preliminary work which may eventually lead to a formal Cabinet decision takes place at the ministry level.

Ministry staff, because of their daily involvement in the administration of existing policies and programs, are in the most advantageous position to contribute to the work involved in formulating new policies, including gathering information, analyzing the implications of alternative courses of action and putting forward proposals and recommendations[2]. Obviously, there are no fixed rules as to the most appropriate method of carrying out policy development. This will depend on a variety of

factors, including the perceived social, economic and political significance of the issue to be examined. Thus, the amount of information gathered and the sources from which it may be drawn will vary considerably from issue to issue and from ministry to ministry. Developmental work may be conducted entirely within a single ministry, or may involve staff of other ministries. In addition, sources outside the government, including special interest groups, technical experts, private consultants, or the public at large, may be asked to provide information, advice or recommendations. Government-appointed advisory bodies may offer suggestions based on their experience. Special task forces may be established. Commissions of inquiry or royal commissions may be appointed to gather evidence and make recommendations.

Whatever procedures are adopted, it is clear that much socially valuable information is produced in the process of formulating policy proposals. The following list gives some examples:

- field studies
- statistical surveys
- opinion polls
- research reports on particular topics
- reports of private consultants
- reports of departmental committees, advisory bodies and task forces
- briefs and submissions from the public
- correspondence within the government and from outside sources
- notes, memoranda of meetings between government officials or between government officials and outside sources
- feasibility studies including estimates of the cost of implementing proposed policies
- assessments of existing policies
- legal opinions and advice from staff lawyers
- draft legislation

memoranda from officials to the minister.

Although this list is not exhaustive, it illustrates the kinds of information which may be generated in the process of formulating policy proposals within the civil service.

At present, there is no legal requirement in Ontario that any of this information be made available to the public: the decision to release or withhold information is in the sole discretion of ministry officials. Nor is there any clear policy or guideline to assist officials in deciding whether to release information. In practice, requests for information of this type are dealt with on an ad hoc, case-by-case basis[3]. As a result, the same information may be given to some requesters but denied to others, depending on a determination of the requester's "need to know."

Some of the civil servants interviewed for our research study stated that in their opinion more information could be made available to the public without harming the policy-making process; however, they felt themselves to be constrained both by the absence of a clear policy on public access and by the terms of the oath of secrecy[4].

Many members of the public who submitted briefs to this Commission cited specific examples from their experience in which denial of access to this kind of information had severely restricted their ability to contribute to the formulation of policies which would affect them[5]. They argued that access to information at this level of the policy-making process -- where alternative courses of action are considered based on information in government hands -- was crucial to the public's ability to influence government thinking before a final decision was made.

In summary, then, there is evidence that the absence of a clear policy on public access to information generated during the policy-formulation stage tends to be a source of confusion and frustration both for civil servants and the public.

#### THE CABINET LEVEL

Once a policy proposal has been approved by the minister in consultation with his senior advisors, it is drawn up as an official Cabinet submission and sent to the Cabinet office. Here it is reviewed by the staff of the Secretary of the Cabinet to ensure that it is in proper form and contains all the necessary analyses and supporting documents. At this point the matter may either be sent directly to the full Cabinet for decision, or it

may proceed through the formal Cabinet committee structure before reaching Cabinet[6].

If the committee structure is used, a proposal will be directed to the appropriate cabinet policy field committee[7]. These committees are chaired by policy field ministers, called provincial secretaries, who are responsible for coordinating the policy proposals of the various operating ministries. Each provincial secretary has his own staff of senior civil servants who analyze the policy submissions and give advice and assistance. Outside groups may be invited to submit formal briefs and make oral presentations to the committee.

If the policy field committee recommends a proposal which involves the expenditure of public funds, the proposal will be referred to the Management Board of Cabinet which provides the financial analyses and recommendations in the light of provincial budgeting priorities. The necessary technical analyses and calculations are performed by members of the staff at the board's secretariat. From here, the submission then goes forward to the Policy and Priorities Board of Cabinet, which is chaired by the Premier. The role of this board is to assess the policy proposed in the light of the overall short-term and long-term goals of the government, and general political considerations. The board is assisted in this task by reports and advice from civil servants in the policy branch of the Cabinet office. The final decision on a policy proposal is generally made at a meeting of the full Cabinet.

Thus, additional information is generated after a submission to Cabinet leaves the ministry and moves through the policy-making process at the Cabinet level. The following are some examples:

- background papers prepared by the Cabinet staff and its committees, including technical analyses
- briefs and submissions from sources outside government
- memoranda of advice from Cabinet staff
- Management Board assessment
- agendas of meetings of Cabinet and its committees
- informal or formal minutes of proceedings
- records of committee recommendations
- records of Cabinet decisions

- draft legislation
- legal advice and opinions

Under current practice, the policy-making process at the Cabinet level is carried on under conditions of confidentiality. Cabinet secrecy is a well-established convention of the Westminster system of government and Ontario follows this tradition. Cabinet confidentiality is maintained in a variety of ways; for example, all ministers must take an oath not to reveal what goes on at Cabinet meetings, and no formal minutes are recorded of the deliberations of Cabinet or its committees[8]. This blanket of confidentiality also extends generally to information and reports which are prepared by the Cabinet staff for the use of ministers and their advisors in their deliberations, regardless of their content.

#### THE LEGISLATIVE LEVEL

When a policy proposal which requires legislative enactment has been approved by the Cabinet and the party caucus, it is tabled as a bill in the Legislative Assembly by the responsible minister, who gives an explanation of its purpose. At second reading, the bill is debated in principle in the House by its members. With unanimous consent, the bill may then proceed directly to third reading and a vote, or it may be referred to the Committee of the Whole or to a standing or select committee of the House. It is at the committee stage that government bills are subject to clause-by-clause scrutiny by the members of the legislature. The ability of the members to have a significant impact on legislative proposals at this stage depends to a considerable degree on their ability to obtain the kinds of information generated during the policy formulation process at the ministry and Cabinet level. It is important, then, to describe the extent to which members of the legislature can obtain this kind of information to assist them in performing their constitutional role of overseeing and scrutinizing government policies.

As a preliminary point, it must be noted that individual members of the legislature have no greater rights to information than do members of the general public. However, members do have certain opportunities to ask for information by virtue of their election to the legislature and appointment to committees. Elected representatives' access to government information is governed by conventions and by standing orders adopted by the House[9]. For example, when a minister introduces a government bill in the House or makes a formal statement of government policy, the standing orders require him to table a compendium of

background information[10]. The purpose of this requirement is to assist the members in assessing the merits of the proposed bill or policy. However, the order requires only that a minister table "some of the relevant reports and studies undertaken by, or available to, the Ministry." Thus, a minister can disclose as much or as little as he wishes. In their briefs to this Commission, both opposition parties were critical of current practices in this matter. Both stated that the quantity and quality of the information provided in this way varies considerably from ministry to ministry and that the kind of information usually provided was not of great assistance to them[11]. A similar situation arises with respect to the budget and estimates debates. Even though opposition members are now given the same Blue Books used by ministers to explain the estimates, the general secrecy which surrounds the budgetary process in Ontario prior to the introduction of the budget in the House makes it extremely difficult for opposition members to perform their constitutional role of checking government expenditures[12].

Members may attempt to elicit information from the government pursuant to a standing order which allows them to submit written questions to a minister, who has fourteen days in which to respond[13]. Requests for information may also be made without prior notice, during the daily question period[14]. However, the minister has no obligation to provide the information requested: he may refuse on the ground that it would be too costly or time-consuming to prepare the answer, or he may simply decline to answer[15]. A member whose request for a document or report is refused may raise the matter on an adjournment debate, which occurs twice a week at 10:30 in the evening[16].

Another procedure available to members is to put a Notice of Motion on the Order Paper calling for the production of a document. The motion can only be called by the government and only during Private Members' Hours. Since Private Members' Hours are held relatively infrequently, this procedure is not of much assistance to members[17].

Committees of the House, on the other hand, do possess the legal power to compel the production of documents or the attendance of government officials to assist them in reviewing and evaluating government legislation or programs[18]. This power, however, can only be exercised with the consent of a majority of the committee. If the governing party has a majority it can effectively prevent opposition members on the committee from inquiring too closely after some document or person[19]. Further, the convention of ministerial responsibility carries with it the notion that civil servants must maintain their neutrality. Accordingly, government officials who appear before a committee

cannot be compelled to answer questions or produce material which might reveal their opinions on current policy or the nature of their advice to a minister. The minister himself may appear before a committee for questioning, but the convention of cabinet solidarity and the oath of cabinet secrecy prevent him from expressing his own opinions on policy should they differ from those of the government as a whole.

In summary, then, although elected members of the legislature do have certain formal opportunities to ask for information, their success in obtaining it is hampered by conventions on the one hand, and by practical politics on the other. The inability of members of the legislature to gain access to information generated in the policy-making process necessarily restricts their ability to influence these policies. By the time a government program in the form of draft legislation reaches the legislature, the issues have usually been analyzed, debated and resolved within the ministry and the Cabinet.

In the view of many political commentators, inadequate access to information is one of a variety of factors which have led to a decline in the policy-making role of the legislative branch in relation to that of the executive[20]. It is possible, then, that greater access to government information could assist in revitalizing the role of the legislature in the making of public policy in Ontario.

#### B. ADMINISTRATIVE ACTIVITY

The distinction between policy making and administrative activity is not clear-cut: information collected for one purpose may also be used for the other. However, in this section we are concerned with existing policies and practices in the Ontario government with respect to public access to information generated in the course of such day-to-day activities as licensing and regulation, inspection, standard setting, testing, contracting, financial administration and program delivery[21]. We will then turn to a brief consideration of the role of annual reports in the provision of information about government administrative activity.

A great deal of information is collected, produced and used by Ontario civil servants in carrying out their administrative responsibilities. The research study undertaken for the Commission identified, among others, the following examples:

- inspection reports of various business operations
- accident reports

- records of compliance with government regulations
- environmental tests
- product tests and safety reports
- assessments of existing programs
- reports on financial administration of government branches
- reports on performance of government branches
- reports on applicants for various government benefits such as licences, grants, research contracts
- curriculum vitae of consultants, technical experts
- assessments and performance ratings of contractors, consultants and other professionals used by government
- correspondence and memoranda from inside and outside government
- minutes of committee meetings held to devise standards
- field reports

At present the Ontario government has no overall policy determining the level of public access to this kind of information. This absence of general policy can result in inconsistent treatment of similar information. For example, the reports of inspectors responsible for ensuring that workplaces conform to government safety regulations must by law be made available to workers[22]. On the other hand, the reports of nursing home inspectors are kept confidential[23]. The entire process of standard setting for elevating devices, including access to technical reports and committee meetings, is public[24]. Similarly, the process of setting standards for worker exposure to certain toxic substances under The Occupational Health and Safety Act is done in consultation with industry, labour and the public[25]. Draft standards must be published in the Ontario Gazette with an invitation to interested persons to submit briefs[26]. These are then analyzed and a revised set of standards published with further opportunity for public comment. A final proposal with accompanying documentation is submitted to the Cabinet for a final decision. Once this has been made, all the material generated in the process, including briefs, correspondence and analyses, will be deposited in the Legislative

Library at Queen's Park where it will be available to the public[27]. In contrast, much of the information generated and used by the Ministry of Environment committee responsible for setting air quality standards in negotiation with industry is not available to the public under current practice[28].

Our research study of access to information about administrative operations indicates that requests from the public for access to this kind of information are dealt with on a case-by-case basis. Requesters are asked to explain why they want the information and how they intend to use it[29]. Information given to some individuals or groups may be withheld from others.

Some government employees interviewed by members of our research staff stated that, in their opinion, much of the information now considered confidential could in fact be made available to the public without serious consequences, and they expressed a desire for clear rules to assist them in dealing with requests for information. In one case, branch staff stated that they would welcome greater public participation in their operations and expressed the hope that more openness would encourage this[30].

However, at the same time, public servants expressed concern over the implications for individual privacy of allowing public access to some of these files, which may contain financial or other information about individuals who have applied for government licences or grants. There is an evident need to balance the public interest in information on the administration of various government programs with the need to protect individual privacy.

A second and related concern was expressed by officials administering programs using information supplied by corporations either voluntarily or under a statutory requirement. It was contended by some officials that corporations would refuse to supply information if it were made available to the public[31]. Again, there is an obvious need to balance the public interest in information with corporate interests in confidentiality.

#### ANNUAL REPORTS

Eighty-nine Ontario statutes require government ministries and agencies to file annual reports[32]. These reports must be tabled in the legislature; they therefore become public documents. This requirement applies to most ministries and to many government-financed institutions, Crown corporations and administrative boards. In addition, many other government agencies produce annual reports, although they are not required to do so by statute.

Many of these reports are highly informative about the programs and activities of the particular ministry or agency, and provide a useful starting point for members of the public who seek information about the government. Others, however, are quite brief and contain very little information concerning the activities of the institution in question. One reason for this variation is that there are no rules or standards establishing what kind of information should be provided in these reports. The Ontario Manual of Administration contains a directive of the Management Board of Cabinet which states that annual reports must contain

...a brief, concise, narrative account of the activities of the ministry or agency. Annual reports shall emphasize the progress over the past year and may include a summary of expenditures, revenues and accomplishments by major program or activity...[33].

In a recent report to the legislature, the Standing Procedural Affairs Committee on Agencies, Boards and Commissions recommended that all agencies in the provincial government be required to table annual reports and that the Management Board of Cabinet establish a standard format for all such reports, including, as a minimum, an outline of their mandate, a description of their organizational structure, a clear financial statement, a review and evaluation of the year's activities, and the goals and objectives for the coming year[34].

#### C. ADJUDICATION: A SPECIAL CASE

One particular form of administrative activity -- the exercise of the power to decide the rights of individuals -- is of particular interest in the context of an examination of the public right to know. Access to information by parties to such proceedings is, as we have indicated in Chapter 7, a matter which is touched upon by a substantial body of legislation and by certain rules of common law. However, the combined effect of these statutory provisions and the common-law requirements of natural justice does leave some latitude in determining what information practices should apply to a particular type of determination. As a result, a complete picture of current practice could only be gained by a separate study of each decision-making tribunal established by the Ontario government. The following survey is confined to an examination of selected tribunals in the context of four important issues arising in the context of adjudicative processes: access to files, the use of in camera hearings, the availability of reasons for decisions, and the use of secret law in administrative decision making[35].

By Parties

The majority of boards which are required by law to hold hearings prior to making a decision are also required to disclose to the parties involved the evidence to be used at the hearing, either by section 8 of The Statutory Powers Procedure Act[36] or by a pre-hearing disclosure provision in the statute under which the board operates. Our survey of tribunals subject to these provisions indicates, as one would expect, that access to the evidence to be considered at the formal hearing is not a problem for the parties concerned[37]. The Environmental Assessment Board, the Environmental Appeal Board, the Ontario Energy Board and the Commercial Registration Appeal Tribunal are examples of boards that do not receive evidence in confidence: their decisions are made solely on the basis of information which is made available to all parties[38]. Although its proceedings are not governed by The Statutory Powers Procedure Act, the Ontario Securities Commission also gives parties pre-hearing access to evidence which will be heard by the commission, often including statements of witnesses who will be called at the hearing[39].

However, where the adjudication process is structured in such a way that an initial decision may be made without a formal hearing of the type contemplated by The Statutory Powers Procedure Act, the question of access by a party to the evidence on which the decision-maker will act is less straightforward[40]. For example, officials within the provincial benefits branch of the Ministry of Community and Social Services are empowered by statute to make decisions on the eligibility of applicants for certain benefits without holding a formal hearing. A similar procedure is followed by the claims officers of the Workmen's Compensation Board. This kind of decision making is, of course, necessary where there is a large volume of claims which must be dealt with in an informal and expeditious way[41]. However, as a general rule persons who will be affected by these decisions are not granted access to the files on which the decision will be based. In addition to information supplied by the applicant, these files may contain reports from police, doctors, psychiatrists, social workers, employers and other sources[42].

If an applicant for provincial benefits appeals an adverse initial decision to the Social Assistance Review Board, he then becomes entitled to see the evidence which will be presented to the board at a formal hearing[43]. Usually, this consists of a written report prepared by the Director of the Provincial Benefits Branch; this report does not necessarily contain all information

relevant to the application in the possession of the provincial branch. The director rarely appears in person at the hearing before the board, and so cannot be questioned[44].

An injured worker who appeals a decision of a claims officer to the Appeal Board of the Workmen's Compensation Board is not granted access to his claims file prior to the hearing. He is, however, given the same summary of evidence that is provided to the board for use at the hearing. However, the board's summary contains the names of those, including doctors, who provided the summarized information; these names are omitted from the appellant's copy[45]. Direct access to the claims file is granted, however, to an arm's-length representative of the worker who will be representing him at the appeal[46]. (The Workmen's Compensation Board defines a representative who is at arm's length as a person whose role in relation to disabled workers is to act on their behalf in communicating with the board. Access is not allowed to any group of disabled workers who wish to represent each other.) The representative can then check the accuracy of the summary by examining the information in the file. A worker who acts on his own behalf is unable to do this.

The explanations offered by government officials for refusing to grant a party access to his file in this context can be summarized as follows:

1. confidentiality is necessary to protect the subject of the file from discovering information, particularly medical information, which might harm him psychologically;
2. members of the medical profession and others would be less willing to provide advice and opinions if they knew that the subject would be given access to them.

In a research paper prepared for the Commission, Professor Ison raised serious questions about the validity of these arguments in the context of access to medical reports held by the Workmen's Compensation Board[47].

#### By the Public

Tribunals subject to The Statutory Powers Procedure Act are required to compile a record of their hearing proceedings. As a matter of practice, these hearing-record files are made available to the public by a majority of these boards. Public access to these files is important as a valuable (and in some cases, the only) means of assessing the conduct and policies of these boards. Members of the public may also desire access in order to find

precedents for a pending adjudication. Our research studies suggest that the practices of some boards may diminish the usefulness of this policy of public access. The Commercial Registration Appeal Tribunal, the Land Compensation Board and the Ontario Highway Transport Board, for example, allow parties to remove exhibits from the files once the appeal time limit has expired, without retaining copies[48]. The Environmental Assessment Board takes its entire hearing file with it to the hearing site so that local residents can have full access[49]. This means that an interested person in another locality must travel to the site in order to see the file. Another difficulty is that most boards, with the exception of the Commercial Registration Appeal Tribunal, do not compile indexes to their hearing files[50]. A person who wishes to research a particular topic faces the rather daunting task of examining every file.

Other boards, including the Criminal Injuries Compensation Board, the Social Assistance Review Board, the Milk Commission, the Registrar of Motor Vehicle Dealers and Salesmen, the Vocational Rehabilitation and Provincial Benefits Branches of the Ministry of Community and Social Services, and the Workmen's Compensation Board do not permit any public access to their hearing-record or equivalent file where no formal hearing is required, because these files contain personal information about individuals[51].

#### IN CAMERA HEARINGS

Boards and tribunals whose proceedings are governed by The Statutory Powers Procedure Act have discretion to hold hearings in camera where they conclude that the need to protect the privacy of an individual outweighs the public interest in open hearings[52]. Hearings before the Building Code Commission, the Commercial Registration Appeal Tribunal, the Land Compensation Board, the Ontario Energy Board, and the Environmental Assessment Board are almost always held in public. On the rare occasions when in camera hearings are held, it is usually to avoid public disclosure of sensitive personal or financial information relating to a party[53]. The term "in camera" as used in a statute may mean "in the absence of the public" or "in the absence of the public or any of the parties," depending on the context in which the term is used. Accordingly, where the term is used in this report its meaning will be governed by the context.

The Criminal Injuries Compensation Board usually exercises its statutory discretion to hold a hearing in camera when the applicant for compensation is the victim of an alleged sexual assault or when a public hearing would prejudice a party's right

to a fair trial[54]. The appeal board of the Workmen's Compensation Board allows members of the public to attend its hearings only if both parties consent[55].

The Social Assistance Review Board is required by law to hold its hearings in camera[56]. The Assessment Review Court hears applications to reduce or cancel property taxes in camera where the application for reduction is based on grounds of inability to pay because of illness or poverty[57].

#### ACCESS TO REASONS FOR DECISIONS

Access to reasons for the decision of an adjudicator may enable the parties affected by a decision to decide whether or not to appeal a particular decision; also, members of the public may wish to scrutinize the conduct of government adjudicators and evaluate the merits of particular laws and policies by discovering how they operate in practice.

Parties who appear before tribunals whose proceedings are governed by The Statutory Powers Procedure Act are entitled to require that the tribunal give written reasons for its decision[58]. Other decision-makers, such as the Director of the Provincial Benefits Branch or the Registrar of Motor Vehicle Dealers, are required by their governing statutes to give reasons when they refuse or cancel a benefit or licence. In some cases, these reasons may be little more than a brief statement that the applicant does not meet the relevant statutory requirements for eligibility, without any reference to the facts of the individual's case[59]. In such circumstances, the applicant may have difficulty in deciding whether or not to appeal the decision.

Public access to the decisions of the various adjudicatory boards in Ontario varies. Of the tribunals examined in our research studies, only the Criminal Injuries Compensation Board, the Commercial Registration Appeal Tribunal and the Liquor Licence Board are required by law to make their decisions public[60]. Access to the decisions and reasons of other boards may still be possible if they have an open files policy. Significant decisions of the Land Compensation Board are published by a commercial publisher in the Land Compensation Reports. The Ontario Securities Commission publishes the full texts of its policy statements, and reports opinions given by the commission in adjudicatory proceedings in its monthly bulletin[61]. The Criminal Injuries Compensation Board publishes summaries of its decisions in its annual report, which is available to the public. The Social Assistance Review Board, which is obliged by law to hold all its hearings in camera and which does not allow public

access to its hearing files, does make copies of its decisions available (with identifying material deleted) to libraries and other interested persons[62]. Decisions of the Workmen's Compensation Board Appeal Board are not published or made available in any form to members of the public[63]. A significant decision of the Assessment Review Court may be reported in the Bulletin of Municipal Assessors. The Ontario Milk Commission sends copies of its decisions to the press gallery at Queen's Park. Many boards which do not publish their decisions will send copies to interested persons on request.

#### ADJUDICATION AND SECRET LAW

The use of secret law in Ontario government adjudication is canvassed in the research study conducted for our Commission by Larry Fox, and discussed in more detail in Chapter 12 of our report. The term "secret law" is used to refer to policy statements, directives, guidelines and administrative manuals used by government adjudicators in making decisions. As the Fox study shows, this kind of material is used by a variety of officials in the Ontario government as an aid in interpreting and applying statutory provisions to individual cases.

Under The Family Benefits Act, for example, the director and staff of the provincial benefits branch of the Ministry of Community and Social Services are empowered to reduce or refuse financial benefits to an applicant who is not making "reasonable efforts" to obtain compensation elsewhere or to realize other financial resources to which he may be entitled. Both The Family Benefits Act and its regulations are silent on the question of what constitutes "reasonable efforts"; a guideline in a manual compiled by the director sets out, for the information of branch staff, what an applicant must do to meet the standard of "reasonable efforts." Although such guidelines are not technically binding as are statutes and regulations, branch staff must obtain permission from their supervisors to deviate from the policies outlined in the manual.

Supplementary material of this kind is usually necessary in order to ensure consistency in the application of broad statutory language to individual cases. Although these guidelines may effectively determine the rights of individuals, as a general rule they are not made available either to the public or to those whose rights may be directly affected by them. Two exceptions in this area are the Ontario Securities Commission and the Workmen's Compensation Board. Both these agencies publish or otherwise make available to the public this kind of information. The Ontario Securities Commission publishes the full text of any commission

policy statements. The Workmen's Compensation Board now makes available to the public the procedures manual of the Claims Adjudication Branch, statements of policies and administrative directives, the medical aid manual and the vocational rehabilitation manual, all of which are used by board staff in making decisions on benefits entitlement.

It should be noted that, as a general rule, the many administrative boards and tribunals in Ontario whose function is to hold formal hearings before reaching a decision do not rely on secret law for guidance. The source of law to which they turn is the legislation under which they are empowered to act, subject to any significance as a precedent that may attach to their own previous decisions[64].

#### D. GOVERNMENT STATISTICS

The collection, analysis and dissemination of statistical information is an important aspect of planning and decision making for most governments today. In a research study conducted for this Commission[65], Professor David Flaherty expressed the opinion that the capacity of the Ontario government to make significant use of statistical information is limited by the decentralized nature of its statistics collection system and by certain inadequacies in The Ontario Statistics Act[66] which make it difficult for the government to take full advantage of information services offered by Statistics Canada.

Unlike some other provinces, Ontario has no central statistical agency equivalent to Statistics Canada. Central Statistical Services (CSS), a branch of the Ministry of Treasury and Economics, does provide statistical services to other ministries within government, but under current government policy its responsibilities are limited. It provides advice to ministries on survey design and methodology, conducts ad hoc surveys at the request of ministries, and collects, processes and publishes economic accounts data and demographic studies. Apart from this, it does no regular surveys of its own. Its resources have recently been reduced: it now has a staff of about forty-five people and a budget of \$1.5 million[67]. Statistical services are offered to ministries by CSS on a cost-recovery basis and, as Professor Flaherty notes, "one of its current goals is never to duplicate the activities of other government agencies"[68].

Most of the statistical work which is done in the Ontario government occurs within individual ministries. For example, the Ministries of Health, Labour, and Transportation and Communications have substantial statistical resources of their own. In

addition to, or instead of, conducting their own surveys, Ontario ministries often go directly to Statistics Canada for data about Ontario. Since over 40 per cent of the information collected by Statistics Canada in its national surveys relates to Ontario, this is an important resource for the provincial government. However, because the confidentiality provisions of The Ontario Statistics Act are not considered sufficiently stringent by the federal agency, provincial access to data collected by Statistics Canada is somewhat restricted.

The federal Statistics Act[69] has two exceptions to the general prohibition against disclosure of the contents of its surveys, from which its statistical tabulations are produced, to anyone outside the agency. Under section 11, identifiable (or raw) data collected jointly with a provincial government department can be released to that body unless a respondent objects. Although in practice few respondents do object, if this were to occur the reliability of the data at the provincial level would be affected[70]. At present, Ontario ministries and Central Statistical Services can only get access to raw data about Ontario under section 11 of the federal act. On the other hand, under section 10, Statistics Canada can make available to qualified provincial statistical agencies raw data without requiring the permission of the respondents. A "qualified provincial statistical agency" for the purposes of section 10 is one whose employees are prohibited by law from disclosing information about surveys which employees of Statistics Canada cannot disclose[71]. Ontario has no such agency. The Ontario Statistics Act, which authorizes provincial ministries to collect statistics jointly with the government of Canada, allows ministers to authorize the dissemination of the contents of the surveys within the collecting ministry[72]. In addition, certain identifying material about those who responded to a survey may be shared by the collecting ministry with other government departments[73]. Officials in Statistics Canada are prohibited by law from revealing any identifiable data from their surveys.

In practice, then, the Ontario government may be denied access to raw data about Ontario unless it has a section 11 agreement relating to each survey conducted by the federal agency.

Professor Flaherty argues that the establishment of a qualified statistical agency in Ontario able to enter into agreements under section 10 of the federal act could provide more efficient access to statistical data for Ontario ministries, thus enhancing their planning and decision-making functions. For example, he notes that the Alberta statistical bureau receives raw data collected in the federal census of manufacturing, and produces statistical tabulations about Alberta in about one-quarter

the time it takes for Statistics Canada to produce its national figures[74]. In Professor Flaherty's view, this enhanced statistical capacity could be of great assistance to the public as well as to the provincial government.

At present, it is difficult for members of the Ontario public to discover the extent of the statistical information held by the Ontario government. Central Statistical Services produces two lists of statistical record holdings in the Ontario government: an index and a catalogue. The index is available to the public. It lists over 300 files, the majority of which are publicly accessible. The catalogue lists over 500 files, some of a statistical nature, others which contain identifiable data. The catalogue is compiled for government use only.

Accessibility of these files is shown as either "confidential," "restricted" or "open." An "open" file is defined as one which has no confidentiality restrictions attached, and in fact most ministries take the position that the information in their "open" files is available to the public on request. However, since the catalogue itself is for government use only and is not available to the public, it may be difficult for members of the public to become aware of and take advantage of this open policy where it does exist. Moreover, according to the catalogue, access to information in files listed as "confidential" or "restricted" may nevertheless be granted on the authorization of the branch director or another senior official[75]. In practice, access to data in these files has been granted to non-governmental researchers, subject to certain restrictions[76]. Each branch determines its own policy. Public access may be granted or denied on the basis of a determination of the legitimacy of the requester's "need to know."

#### E. COMMUNICATIONS POLICIES AND PROGRAMS

Communications policies and programs have been the subject of a number of government studies in recent years. In 1972 the Committee on Government Productivity (COGP) examined existing information practices of the Ontario government and made a series of recommendations aimed at improving its communications and information services. It was the view of the committee at that time that government communications had not "kept pace with the growing complexity of government, its increasing involvement in the lives of citizens, and the new desire and ability of citizens to participate"[77].

The committee identified as a priority in this area Cabinet development and enunciation of an overall policy on government

communications, which would "remove confusion and ambiguity within the Government as to the legal, political and social rights of the citizen to acquire information"[78]. The committee suggested the following general principles as a foundation for the development of this policy:

- Every citizen of Ontario has equal right of access with every other citizen to government information.
- Every citizen has an equal right to offer his views to government and an equal opportunity to communicate with government.
- Government has an obligation to improve communications and to provide full, timely, accurate and understandable information on government policies, objectives and programs.
- Government has an obligation to protect the privacy of the individual[79].

Acceptance of these principles did not lead the COGP to consider a freedom of information statute which would give Ontario citizens legal rights to information[80]. Rather, it was the committee's view that the Cabinet should establish an overall policy framework within which individual ministries could set their own operating guidelines to give effect to the policy.

The committee then made a number of specific recommendations aimed at improving communications in three areas: from the government to the people, from the people to the government, and internally within government. In drawing up its recommendations, the committee stated that it was operating on two basic assumptions. The first was that information should be viewed as "a support activity for larger programs" and therefore the responsibility for setting objectives should rest with program managers. Second, the committee stressed that individual ministries should be free to develop and organize their communications functions in accordance with their own needs and those of the special publics they served[81].

As part of the process of implementing an open communications policy for government, the committee suggested that the following steps be considered:

an evaluation of existing constraints on disclosing government information with the objective of reducing to the lowest level possible the number of exclusions;

- the use of White and Green Papers to allow for more government-public dialogue in policy making;
- the development of systems which would overcome communications barriers caused by different ethnic and educational backgrounds, geographic locations, communications media, socio-economic status and language difficulties;
- programs to ensure that public servants themselves had full, accurate, understandable and timely information about government policies and programs[82].

The committee further recommended that the personnel involved in communications and information services in the government be given more training in general management, in the use of scientific research methods for public opinion and attitude surveys and in a variety of communications techniques to equip them to play a fuller role in advising program managers on communications[83].

The need to improve the training of communications personnel was also the subject of the Manpower Planning Task Force report of 1977. The task force noted low morale and high turnover rates in this group and attributed it to lack of opportunities for career advancement. It recommended, inter alia, the establishment of a formal system of manpower training and career development programs to remedy the situation.

In 1977, the Committee on Customer Services, established by the Cabinet Office, made a series of recommendations on ways and means to improve government services to the public, including the simplification of legislation, regulations and internal procedures, the development of "one-window" customer service by groups of ministries dealing with inquiries on the same subject matter, and the establishment of formal systems to facilitate public access to government offices and to ensure that essential information was readily available to employees who dealt directly with the public[84].

As part of this ongoing assessment of government communications, the Cabinet Office appointed Keith Martin, a public relations consultant, to survey the information service branches of the ministries. The Martin report[85], submitted to Cabinet in 1977, analyzed existing structures and practices of these information service units and made several recommendations chiefly directed at upgrading the status of the personnel and expanding their role as advisers to senior program managers. This was in keeping with the Committee on Government Productivity's recommendations that communications be given a higher priority by program managers[86].

One outcome of the Martin report was the appointment in 1978 of a Coordinator of Communications Policy in the Cabinet Office. His task is to bring about a greater degree of coordination of communications management systems, procedures and practices in the ministries. In July 1979 the Premier announced the formation of an Advisory Committee on Improving Government Services made up of six representatives of the Ontario business community and three senior public servants. Reporting to the Policies and Priorities Board of Cabinet, which is chaired by the Premier, the advisory committee reviews, monitors and evaluates existing government communications policies and practices[87].

It is clear from this brief survey that communications policies and programs within the Ontario government continue to be the subject of review and evaluation. The following section describes some of the programs which are currently in operation.

#### **EXISTING COMMUNICATIONS PROGRAMS AND SERVICES**

It has been estimated that in 1977-78 the Ontario government spent approximately \$50 million and employed over 300 people in providing information services to the public. Of this amount, \$10 million was spent on advertising, \$17 million on telephone services and much of the rest by the information branches of each ministry.

#### **Information Branches**

Most government ministries have their own information branches or units whose major role is to keep the public informed about the activities and programs of the ministry. They also advise program managers on communications planning[88]. In addition, they prepare news releases and speech material for ministry officials. The information service branch of the ministry also provides advice on publications design and production techniques. Decisions to publish informational material are made by the program managers. Prior to approving material for publication, senior managers must consider the following criteria:

- the effectiveness of the publication in prompting one or more ministry policies or programs;
- information already published by another ministry or agency, or any other public or private organization;
- the size and significance of the group at which the publication is directed;

- the effectiveness of other means of conveying the information, such as radio, television or film;
- the availability of funds;
- the possibility of adding the information as supplementary material in the revision of an existing publication[89].

Once material has been approved for publication, the information service units either produce the material themselves or make arrangements for outside production.

### Publications

There are approximately 2,000 government publications currently in circulation, ranging from consumer information pamphlets to an index of courses at community colleges. The Ministry of Government Services publishes an annual catalogue of Ontario government publications which is available at the government bookstore. In addition, the ministry publishes a monthly checklist of new publications, which is available free of charge from the ministry, and a quarterly publication, Catalogue des publications du gouvernement de l'Ontario en français which is also available free of charge. The government has also made greater use in recent years of radio, television, videotape, photography, exhibits and displays to inform the public about its programs and services.

### Advertising

Approximately one-half the money spent directly by ministry information branches is spent on advertising; much of it is used by the Ministry of Industry and Tourism on programs to promote tourism and industrial development in Ontario. Recent examples of advertisements placed by other ministries include anti-littering and highway safety campaigns.

### Media Relations

Staff of the information branches are also involved in answering requests for information from the media. If the information sought is not already approved for release, information officers first request approval from senior officials before responding. As noted above, staff of the information branches prepare news releases for distribution to the media. In order to

ensure that the media throughout Ontario have access to government information, the government is currently testing an integrated mailing system for sending ministry press releases and other material to Ontario weekly newspapers throughout the province. Consideration has also been given to setting up a teletype service from government offices directly to newspapers, radio and television stations around the province, although it is felt that at present it would be too expensive to implement such a service. "Ontario 20" is a program which ensures that the non-English language media are supplied with government information.

### Citizen Inquiry Systems

One of the recurring themes in the reports on communications policies was the need for the government to establish formal systems to make it easier for members of the public to locate the government office they needed for information or assistance. The main switchboard at Queen's Park has, of course, always operated as a general referral service for callers and it handles thousands of calls every day. Individual ministries also receive thousands of calls on a daily basis. In addition, the Citizens' Inquiry Branch of the Ministry of Culture and Recreation operates as a telephone referral service.

The Ministry of Government Services publishes and distributes through the government bookstore a telephone directory to assist the public in locating the appropriate government office. The most frequently called government telephone numbers are listed separately under the government listing in the Bell Telephone directory. The "KWIC Index," another ministry publication, lists and describes the functions and programs of government ministries in order to help the public locate the proper ministry or branch for information or assistance. ACCESS is a program established in 1979, which provides toll-free direct dialing to government offices for citizens outside Toronto. This program is currently operating in London, Ontario, on an experimental basis, and the government intends to expand this service into other parts of the province in the future. The Consumer Information Centre of the Ministry of Consumer and Commercial Relations acts as an information clearing house for consumer inquiries. The Women's Bureau of the Ministry of Labour is an information and resource centre for individuals and groups concerned with issues relating specifically to women. In addition, the government has begun to make use of the Supermarket Information Network in Ontario by purchasing space to display information about its programs.

## Community Information Centres

The Community Information Centres Branch of the Ministry of Culture and Recreation provides partial financing to community information centres located in more than fifty Ontario towns and cities. These information centres, largely staffed by volunteers from the local community, act as general referral agencies for all three levels of government and other community service groups. They play a valuable role in the community by assisting local residents in locating information about services they may need, particularly in the social welfare field. The Community Information Centres Branch of the ministry is compiling a common data base for all centres to assist government in determining what specific groups need particular kinds of information. However, due to government spending restraints, this project has not yet been completed.

Early in our public hearing process, we received several submissions from community information centres and from the Association of Community Information Centres in Ontario, an umbrella organization. The association made several recommendations with particular reference to the effectiveness of current procedures for the dissemination of government information. It indicated the need for government to provide information about its services on an ongoing basis in straightforward language, the need to ensure that "front-line" government staff had accurate and up-to-date information readily available to them and were able to communicate with people whose language was not English, the desirability of providing toll-free telephone service for people in areas of Ontario where there are no provincial government offices, and the need to make better use of a variety of existing networks throughout the province for the distribution of government information[90].

As we have described above, the Ontario government has now instituted several programs along these lines and is in the process of testing and evaluating others.

## **THE ONTARIO GOVERNMENT'S COMMUNICATIONS POLICIES AND PROGRAMS AND THE FREEDOM OF INFORMATION ISSUE**

In the communications programs we have described, the provision of information to the public is generally treated as a necessary adjunct to the support and promotion of substantive government programs and services. Reforms in this area are mainly concerned with improving systems and procedures to provide more effective dissemination of certain kinds of information. A second major aspect of such programs is the development of institutional

mechanisms to facilitate public access to government so that citizens can make their needs known. For the most part, it is the government which ultimately decides what kinds of information can usefully be distributed. Widespread dissemination of information about its programs and services is a vital responsibility of modern government today. It is clear that the government of Ontario has done and is continuing to do a great deal to meet this responsibility.

The freedom of information issue, on the other hand, is concerned with providing access to information about government in order to enhance the public's ability to participate in public affairs and in order to ensure that the government is held politically accountable for its actions. Under a freedom of information statute, a member of the public has an enforceable legal right to obtain information. On occasion, this may involve the disclosure of information which the government would prefer, for a variety of reasons, not to release. In this fundamental respect, freedom of information policy responds to concerns different from those met by communications programs.

#### F. RECORDS MANAGEMENT

In 1969 the Ontario government established a records management program, which is administered by the Management Board of Cabinet. The objective of the program, which applies to all Ontario ministries, agencies, boards, commissions and Crown corporations (unless exempted by Management Board) is to ensure "economy and efficiency in the creation, maintenance, retrieval, storage and disposition of records"[91].

Under this program, each ministry and agency is required to compile schedules listing their record holdings, describing their contents and purpose and stating how long they intend to retain the records in the originating office, and how long they plan to retain less active files in the Government Record Centre in Cooksville. (Figure 1 shows an example of a records schedule form.) At the end of this period, the records are either destroyed or transferred to the Archives of Ontario if the provincial archivist finds them to be of permanent historical value[92]. The Archives Act provides that no government records are to be destroyed without the knowledge and concurrence of the provincial archivist[93].

In addition, each ministry or agency is required to stipulate on the schedules whether public access is to be allowed to the records and, if so, when. This information is for the guidance of the officials at the Cooksville centre or the archives when they



## RECORDS SCHEDULE

Schedule Number:

Technique

Existing Authority to dispose

1. Record Series Title

2. Ministry, Division, Branch, Section, Region, District Office

3. Physical Format	Other	4. Basic Size
<input type="checkbox"/> Files <input type="checkbox"/> Cards <input type="checkbox"/> Plans <input type="checkbox"/> Ledger <input type="checkbox"/> Microfilm <input type="checkbox"/> Tapes		

5. File System	By
<input type="checkbox"/> Alpha <input type="checkbox"/> Numeric <input type="checkbox"/> Alpha-Numeric <input type="checkbox"/> Chronological	

6. Index System	7. Retained by	Other
	<input type="checkbox"/> Calendar Year <input type="checkbox"/> Fiscal Year <input type="checkbox"/> Continuous	

8. Record Series Description	Duplicates held by
<input type="checkbox"/> Original and/or <input type="checkbox"/> Copies	

9. Record Series Purpose	<input type="checkbox"/> Operational <input type="checkbox"/> Housekeeping
--------------------------	----------------------------------------------------------------------------

10. Retention Requirements			11. Records Disposition - Initial Schedule Implementation			12. Access to Records restricted?	
Hard Copy	Micro-film	Security Copy	Cubic Feet	Date Range		Yes	No
In Ministry (current plus)			Retain in Ministry	From		Locally	
In Ontario Government Records Centre			Transfer to Ont. Government Records Centre	To		In Ontario Government Records Centre	
Total Years			Transfer to Archives			In Archives	
Final Disposition	<input type="checkbox"/> Transfer to Archives	<input type="checkbox"/> Destroy	Destroy in House			13. Estimated Annual Accumulation	

Qualifying Factors/Archives Limitations		Branch Director	Date
		Legal Counsel	
		Deputy Minister	
Approvals		Provincial Auditor	
Records Manager		Archivist of Ontario	
Ministry Fiscal/Other			

deal with requests for access to records in their custody. As a general rule, records which were open to the public when they were in active use continue to be available to the public wherever they are stored. Similarly, records which the originating ministry considers confidential retain that status whatever their location[94].

We understand that more than 80 per cent of the government's files have been brought within this records management program. In the early stages of our research program into current information practices in the Ontario government, our research staff attempted to use these records schedules as a research tool. Inasmuch as the schedules list and describe the contents of records held by the government, it was thought that the records schedules could form the basis for an index of government record holdings which would be of assistance to the research team and which might form a prototype for an index, which could be made available to the public as part of a freedom of information scheme.

Accordingly, the research staff arranged to have a computer printout made of the titles of the records schedules of selected ministries. Some of the staff found this printout to be helpful in their contacts with government officials; others found that the listings did not provide enough information to assist them in framing requests for information. The privacy research team, for example, found that it was impossible to identify from these listings which government records contained personal information about individuals[95]. It appears that an index of record holdings of the government which would be of significant assistance to the public in implementing a freedom of information scheme could not be produced from these records schedules.

#### G. THE ARCHIVES OF ONTARIO

Responsibility for the collection and preservation of material of significance to the history of Ontario, including records of the Ontario government, rests with the Archives of Ontario. To ensure that such material is made available to the archives, The Archives Act provides that all original documents produced by the government must be delivered to the custody of the provincial archivist within twenty years of their ceasing to be in current use[96]. No public records are to be destroyed without the authorization of the archivist[97]. The archivist, then, has an important role to play in the records management program (described in Section F of this chapter). He must ensure that historically valuable records produced by government institutions are identified and preserved for ultimate transfer to the archives.

The Archives Act itself makes no express provision for public access to records in archival custody. However, Ontario follows the practice of many other Commonwealth jurisdictions in making government records in its custody publicly available when they are thirty years old. The thirty-year rule is simply a general guideline, however, and not a statutory requirement. As we outlined in Section F, the responsibility for deciding which government records should be treated as confidential, and for how long, rests with officials in the originating ministry, who may stipulate longer or shorter periods for restricted access.

Requests for access to records in the archives which are still under restricted access are referred by archives staff to officials in the originating ministry. Early access to confidential records in archival custody has on occasion been granted to scholarly researchers or others whom ministry officials decide have legitimate reasons for consulting such material[98].

It should be emphasized that the thirty-year rule is a conventional time period, developed by national archives which are concerned to protect sensitive defence or foreign policy documents. In a jurisdiction such as Ontario, where relatively little of this kind of material would be generated, it would appear that thirty years is too long a period during which to restrict access by the public to historically valuable information. Moreover, the thirty-year rule has been undergoing revision in recent years in a number of jurisdictions. In England, the archival limit has been reduced to fifteen years for many government records. The freedom of information bill introduced by the Canadian federal government in 1979 would have permitted the release of Cabinet documents and policy-making records after twenty years[99]. In the United States, most law enforcement records are available to the public after fifteen years, and government information classified as "top secret" is released after ten years, "secret" after eight years and "confidential" after six years.

In Ontario there are no general guidelines applicable to all ministries for access to similar types of government records: each ministry or agency decides for itself how long its records are to be kept confidential while in archival custody[100]. Moreover, certain documents, such as notes and records kept by officials in the Cabinet Office, are not transferred to the archives and therefore never become subject to the thirty-year rule[101].

## H. LOCAL GOVERNMENT INSTITUTIONS

Information practices at the local government level vary across Ontario. One reason for this is that the legislative framework for public access to local government information is skeletal. A second, related reason is the absence in many municipalities of any strong tradition favouring openness. Indeed, as the study conducted for us by Professors Makuch and Jackson shows, the notion that the public has a right to be fully informed about local government decision making might be regarded, in some Ontario municipalities at least, as a rather novel proposition[102].

In law, members of the public have a right to attend the formal meetings of most local bodies. However, these bodies are permitted to engage in in camera discussions and deliberations, and admission of the public to these is at the discretion of the members[103]. As long as final resolutions are passed in public session, the requirements of the law will be satisfied. This applies to municipal councils, public utilities commissions, transportation commissions, public library, health, planning and school boards[104].

The public's right of access to information is similarly restricted to the essential records of local government. Municipal councils are only required to make available to the public their by-laws and resolutions, certain financial information, and any other reports or documents in "the possession and control" of the clerk. Expressly excepted from this latter category are interdepartmental correspondence and reports from departmental officials or municipal solicitors made to council or its committees[105]. Thus, the reports and research studies done by the administrative branches of local government may only become publicly available if they are received in open meetings of council or its committees. In many municipalities, this kind of information rarely finds its way into the "possession and control" of the clerk of the municipality.

School boards, which make decisions about the location, opening and closing of schools, teacher hiring and firing, and the provision of special school programs, among other matters, are legally required only to make public the minute books, the audited financial report and the current accounts of the board[106]. Again, there is no obligation on school boards to make public other information, including research studies or reports done by board staff, although in practice many boards do so.

Boards of police commissioners, which oversee the functioning of law enforcement in municipalities, including citizen com-

plaints, the use of firearms by police, personnel policies within the force and the use and purchase of special equipment, are not required to make any information about their proceedings public; even their own by-laws can be kept secret[107].

There are no statutory or common-law rights to information about other local public authorities. Apart from those matters that are covered by statutory provisions, the development of policies to provide for greater openness is left to the elected officials themselves. Some local governments in Ontario have adopted information practices which go well beyond these statutory minimums, although these appear to have developed ad hoc as a result of the attitudes of particular politicians or in response to public pressure for greater access to information. Others have continued to take full advantage of their right to preserve secrecy, and they conduct a great deal of the public's business behind closed doors. Our research study found that the majority of municipalities looked at fell somewhere in between these two poles, although the policy of confidentiality adopted by boards of police commissioners is almost universal in Ontario.

In those municipalities which can be characterized as "open," council and its committees do not hold private meetings (with the exception of the executive committee, the municipal equivalent of the Cabinet in the parliamentary system). Open meetings ensure that the public and the press have access to the information presented to council and to its deliberations. Notice of upcoming meetings is advertised. The proposed agenda is made available to the press and public prior to the meeting. Community delegations are received at open meetings, either of council or of the appropriate committee of council. However, exceptions to this general rule of openness do occur. When the executive committee meets to discuss such matters as personnel, litigation, collective bargaining strategy or the parliamentary budget, for example, the meetings are usually held in camera. Therefore, these discussions and deliberations of the executive committee as well as reports or other information received by the committee sitting in private are not a matter of public record. In some cases, however, this kind of information may eventually be made public, and permit an after-the-fact review of the merits of a particular decision.

In other communities, closed meetings are the rule rather than the exception. No formal minutes of closed meetings are kept. Staff reports, reports of standing committees (which have also met in secret) and all other information received at these meetings remains secret. Unless this material is referred to the public meeting, the public may never learn of its existence, let alone its content. Delegations are often received at closed meetings, thus preventing other members of the community from

knowing what is being presented to council, unless the delegation itself seeks publicity for its particular cause. The use of closed meetings is therefore a very effective device for blocking public access to a great deal of significant information. In one municipality, the public session of council consisted solely of the reading aloud of correspondence received. The council then voted itself into session as the Committee of the Whole, and held the rest of the meeting in camera[108].

Our research study found other practices which frustrate public knowledge and involvement in several communities, such as the failure to publicize meetings or to provide agendas and background material in advance, and the use of "special meetings" to pass controversial by-laws. These meetings are called on short notice and are held at hours of the day which make it virtually impossible for members of the public to attend. In some smaller communities, although meetings are not officially closed, the practice of holding them over lunch at a local restaurant may amount to the same thing by discouraging the attendance of all but the most zealous and determined political activist.

As we said in Chapter 2, this Commission received several briefs dealing with access to information at the local government level in Ontario. Some of these came from publishers and editors of newspapers in Ontario who gave specific instances of situations in which government secrecy had made it difficult for them to keep their readers informed about the activities of local government. Some citizens' groups also supplied us with case histories of their attempts to bring about more open government at the local level. The Association of Municipalities of Ontario, whose membership consists of both elected and appointed municipal government officials, acknowledged in its brief that the existing legal framework had led to disparities in practices among its members, and stated its support for legislative reform of the statutes which govern their procedures to establish clearer rules on public access to information about local government[109].

## CHAPTER 8 NOTES

- 1 See John Eichmanis, Freedom of Information and the Policy-Making Process in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 13, 1980), cited hereafter as Eichmanis.
- 2 The significance of the role played by ministry officials in policy making is illustrated by the fact that special interest groups concentrate their efforts to influence government decisions at the Cabinet and ministry, not the legislative, level. See Eichmanis, 53.
- 3 Ibid., 165.
- 4 Ibid..
- 5 See Chapter 2 of this report.
- 6 The formal committee structure is followed about 50 per cent of the time: Eichmanis, 25, note 23.
- 7 Ibid., 68-76.
- 8 Informal notes are taken only for the purpose of preparing a record of final decisions: Eichmanis, 25.
- 9 Procedure in the House is currently governed by Standing Orders adopted by the House on April 22, 1970, and by special Provisional Orders adopted on June 27, 1977. Many of the latter contain reforms recommended by the Ontario Commission on the Legislature (the Camp Commission) in 1975.
- 10 Provisional Order Number 8, June 27, 1977.
- 11 See the Official Opposition, Brief No. 91, and the Ontario New Democratic Party, Brief No. 42.
- 12 Ibid. For a description of the budgetary process in Ontario, see Eichmanis, 89-95. Attempts have been made in other jurisdictions to open up the budgetary process: The U.K. government publishes preliminary case studies on expenditure estimates and budget priorities as White and Green papers which are debated in Parliament. See Eichmanis, 154-56.
- 13 Standing Order 27(a) and Provisional Order 10.

- 14 The right to ask questions in question period without giving advance notice is a relatively recent phenomenon in Ontario. Until the 1969-1970 session, all questions had to be submitted in advance of the sitting to the Speaker who decided which, if any, would be called: Ontario Commission on the Legislature, Fourth Report (September 1975) 34.
- 15 Standing Order 27(i).
- 16 Provisional Order 4.
- 17 Mr. Sean Conway gave five examples where his notice for production of documents had been ignored by the government: see Brief No. 91.
- 18 The Legislative Assembly Act, R.S.O. 1970, c. 208, s. 35.
- 19 In a minority government situation, however, this power can be effective. In August 1978, for example, the opposition members of the Select Committee on Health Care Financing and Costs were able to compel the Minister of Health to produce copies of two public opinion polls commissioned by the ministry which he had previously refused to disclose: Brief No. 91, 6.
- 20 Ontario is not unique in this respect. The decline of the role of the legislative branch in relation to that of the executive in Western democratic governments is the subject of an ever-increasing body of literature: see Eichmanis, 80-81. The development of this phenomenon in Ontario is described in F.F. Schindeler, Responsible Government in Ontario (Toronto: University of Toronto Press, 1969).
- 21 See Hugh Hanson, Access to Information: Ontario Government Administrative Operations (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 6, 1979), cited hereafter as Hanson.
- 22 The Occupational Health and Safety Act, S.O. 1978, c. 83, s. 29.
- 23 Hanson, 29-33.
- 24 Ibid., 70-72.
- 25 Ibid., 69-70.
- 26 The Occupational Health and Safety Act, S.O. 1978, c. 83, s. 22.

- 27 Hanson, 70.
- 28 Ibid., 66-67.
- 29 Ibid., 142.
- 30 Ibid., 72.
- 31 Ibid., 102.
- 32 A complete list appears in T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979), App. J, cited hereafter as Brown.
- 33 Ontario Manual of Administration, Directive 65-7-2.6, August 28, 1977.
- 34 Report of the Standing Procedural Affairs Committee on Agencies, Boards and Commissions, tabled in the legislature on November 9, 1978.
- 35 This section is based on the findings of the following research studies: Larry M. Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979); T.G. Ison, Information Access and the Workmen's Compensation Board (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 4, 1979) and M.Q. Connally, Securities Regulation and Freedom of Information, (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 8, 1979), cited hereafter as Fox, Ison and Connally respectively.
- 36 S.O. 1971, c. 47.
- 37 Fox, 57.
- 38 Ibid.
- 39 Connally, 37.
- 40 See the discussion of adjudication and the rules of natural justice in Chapter 7.
- 41 In 1978, for example, the Ontario Workmen's Compensation Board processed over 400,000 claims for compensation.

- 42 Fox, 49; Ison, 75.
- 43 The Family Benefits Act, R.S.O. 1970, c. 157, s. 12(6).
- 44 Fox, 84.
- 45 Ison, 75.
- 46 Ontario Workmen's Compensation Board, Brief No. 94.
- 47 Ison, 81-112.
- 48 Fox, 47.
- 49 Ibid., 48.
- 50 Ibid., 175.
- 51 Ibid., 48-49; Ison, 67.
- 52 S.O. 1971, c. 47, s. 9(1).
- 53 Fox, 50-51.
- 54 Ibid., 51.
- 55 Ison, 26.
- 56 The Ministry of Community and Social Services Act, R.S.O. 1970, c. 120, s. 7c(1).
- 57 Fox, 51.
- 58 S. 17.
- 59 For a sample letter giving reasons from the Provincial Benefits Branch, see Fox, 83. See also Ison, 70-73.
- 60 Brown, 100.
- 61 Connelly, 32.
- 62 Fox, 173.
- 63 Ison, 69, 73.
- 64 Fox, 203.

- 65 David H. Flaherty, Research and Statistical Uses of Ontario Government Personal Data (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 5, 1979), cited hereafter as Flaherty.
- 66 R.S.O. 1970, c. 443.
- 67 Flaherty, 34, 37.
- 68 Ibid., 35.
- 69 S.C. 1971, c. 15, as amended by S.C. 1977.
- 70 Flaherty, 45.
- 71 Ibid.
- 72 R.S.O. 1970, c. 443, s. 4(2).
- 73 Ibid. Section 6(2) permits the minister to divulge to other government departments the names and locations of businesses surveyed and the types of products they manufacture.
- 74 Flaherty, 45.
- 75 Ministry of Treasury and Economics, Catalogue of Statistical Files in the Ontario Government, 1978 (March 1979) i. The 1978 edition is much improved over previous years; the confidentiality provisions have been greatly simplified.
- 76 Flaherty, passim.
- 77 Ontario Committee on Government Productivity, Interim Report Number Seven (June 1972) 1, cited hereafter as COGP Report.
- 78 Ibid., 11.
- 79 Ibid., 12.
- 80 Ibid., 1.
- 81 Ibid., 5-6.
- 82 Ibid., 13-14.
- 83 Ibid., 35. The committee recommended that the government make greater use of public opinion and attitude research as a means of improving communications from the people to the government; it also stressed the need for giving immediate

- access to such research study results and their methodology to the public and all political parties: idem, 33.
- 84 Ontario Committee on Customer Service, Report (February 1977) 10-14.
- 85 Keith Martin, A Survey of the Information Services of the Government of Ontario (September 1977).
- 86 COGP Report, 9.
- 87 Office of the Premier, news release, July 5, 1979.
- 88 All Cabinet submissions from ministries must now be accompanied by a communications strategy which outlines the implications of a proposed policy, identifies those citizens who may be affected, sets out the media budget, and suggests ways to achieve the maximum publicity for any announcements to be made.
- 89 Ontario Manual of Administration, Directive 65-5.
- 90 The Association of Community Information Centres in Ontario, Brief No. 35.
- 91 Ontario Manual of Administration, Directive 55-4-1, April 16, 1979.
- 92 D.F. McOuat, Ontario archivist, memorandum to the Commission, August 11, 1977. Mr. McOuat has since retired.
- 93 R.S.O. 1970, c. 28, s. 6.
- 94 D.F. McOuat, Memorandum, 4.
- 95 See M. Brown, B. Billingsley and R. Shamai, Privacy and Personal Data Protection (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 15, 1980).
- 96 The Archives Act, s. 3.
- 97 Ibid., s. 6.
- 98 D.F. McOuat, former Archivist of Ontario.
- 99 Bill C-15, ss. 21 and 22. The bill received first reading on October 24, 1979, but the government was defeated before it proceeded further.

- 100 Interview with William Ormsby, Archivist of Ontario,  
Feburary 18, 1980.
- 101 Ibid.
- 102 S.M. Makuch and J. Jackson, Freedom of Information in Local Government in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 7, 1979), cited hereafter as Makuch and Jackson.
- 103 The Municipal Act, R.S.O. 1970, c. 284, s. 190. Local government institutions are created by statute and therefore their rights and obligations are determined by statute, not by common law.
- 104 The Municipal Act; and The Education Act, S.O. 1974, c. 109, s. 179.
- 105 The Municipal Act, s. 216(1).
- 106 The Education Act, S.O. 1974, c. 109, s. 179(3).
- 107 The Police Act, R.S.O. 1970, c. 351, s. 10(3) and s. 16; and McAuliffe v. The Metropolitan Board of Police Commissioners (1975) 6 D.L.R. (3d) 223.
- 108 Makuch and Jackson, 72.
- 109 Association of Municipalities of Ontario, Brief No. 90.



## CHAPTER 9

# The Need for Reform

Modern governments play an increasingly important role in the daily lives of the citizenry. The growth in the scale of public institutions and the importance of the decisions taken by them have led to the expression of increasingly vocal concerns that public affairs be conducted in conditions of greater openness and publicity than in the past. The remarkable breadth of the political consensus favouring the establishment of some means of recognizing a public right to know was evidenced in the briefs presented to this Commission. Although the briefs indicated some disagreement as to the proper means for effecting reform, organizations and individuals who made presentations to the Commission invariably supported the view that change in the direction of greater openness was desirable.

In Chapter 4, the major rationales for the establishment of greater openness in government were stated. These may be briefly summarized in the following terms:

- accountability: greater accessibility of government information would render governmental institutions more accountable to the legislature and to the public at large;
- public participation: access to government information would facilitate informed participation in public debate concerning the formulation of public policy;
- fairness: access to government information by individuals would conduce to fairness in the making of determinations affecting individuals;
- personal privacy: access to government files containing personal information by the subjects thereof would reduce the extent to which personal privacy is invaded by government record-keeping practices.

In many respects, these arguments consist of a reassertion of fundamental democratic values in the context of modern social and political conditions. The accountability of the government to the electorate is the underlying premise of democratic government. The importance of informed public debate to a system of government

was eloquently expressed by Sir Lyman Duff, then Chief Justice of the Supreme Court of Canada, in the following terms:

There can be no controversy that [parliamentary] institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and countercriticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibility in the election of their representatives...it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions[1].

Applying this philosophy to our findings we have concluded that the right of individuals to obtain access to government information does not receive full, systematic definition in the laws of Ontario. Indeed, the existing law relating to government information practices offers little support for the concept of a public right to government information.

Members of the Legislative Assembly are no different, in this respect, from members of the public. A member of the legislature does not enjoy a right of access to government-held information by virtue of his status as a member. It is true that the Legislative Assembly itself can require public officials to produce information and documents. In the context of a majority government, however, decisions to release information reside effectively in the control of the government of the day.

The inaccessibility of much information concerning administrative matters appears to result from the absence of a general policy with respect to government-held information. In the absence of clear guidelines, as we have noted, inconsistent responses are given to requests for similar material. Moreover, individual public servants confronted with requests demonstrate an understandable concern to avoid making disclosures that their superiors may ultimately judge to have been inappropriate. In some cases, our research staff found that although policies permitting public access had been established by senior officials with respect to certain kinds of materials, officials at lower levels, unaware of the policy, would deny requests for access.

The absence of a policy favouring openness with respect to information relative to policy formulation processes was also

noted in our research studies and was the subject of criticism in briefs presented to the Commission by members of the opposition parties of the legislature and members of various other groups and organizations. Although the government has adopted a policy of tabling compendiums of background information when introducing legislation in the legislature, the government of Ontario does not routinely make available all information of this kind gathered at public expense. We believe that much more of this material can and should be made available than is now the case. In many instances, the government is the major if not the exclusive source of information relating to important questions of public policy. In the absence of public release of these materials, informed public debate is simply impossible.

We should add that we have no reason to believe that the practices of the government of Ontario are, in these respects, unusual when compared to the practices of other parliamentary jurisdictions without freedom of information laws. Practices of administrative secrecy and an almost proprietary view of government information are common in other parliamentary jurisdictions. As in Ontario, of course, government information practices have also become the subject of public discussion in these jurisdictions.

Our view is that the current level of openness prevalent in the information practices of Ontario governmental institutions and the legal framework relating to government secrecy and the right to know do not adequately respond to the claims to be made for the right of individuals to be informed of government activity. Indeed, we do not view this as a contentious point. As we have indicated, there is a remarkable unanimity among those who have addressed this subject -- politicians of each of the major parties, public servants, representatives of business, labour and other organized groups, and individual members of the public. There is a difference of opinion between those who advocate reform through the adoption of internal administrative guidelines or policies relating to the disclosure of information and those who advocate the enactment of freedom of information legislation that would secure an enforceable legal right of access to government information.

It is the Commission's view that the preferable mechanism for implementing a new information access policy would be the enactment of a freedom of information law. The enactment of legislation would signal an important and marked departure from previous practice and would ensure uniformity in the implementation of access policies throughout the many governmental institutions established by the province of Ontario. If a right of public access to government-held information is to be recognized

as a fundamental aspect of the relationship between citizens and their government, it is appropriate that the right be enshrined in law. Moreover, in the absence of a legislated right of access, we fear that a freedom of information policy would not accomplish what we view as important objectives: the establishment of a means whereby the citizen can be assured that effective scrutiny of government can occur, and the creation of an atmosphere in which public confidence in the integrity and effectiveness of public institutions is encouraged. Refusal to disclose government documents on the basis of "internal policy" or "administrative guidelines" is likely to be viewed with mistrust by the public.

Finally, implementation of a freedom of information policy is likely to be more successful if it is enshrined in law. A legislated scheme would act as a more effective counterweight to the existing and extensive statutory law providing for the confidentiality of various kinds of government documents than a scheme based solely on administrative guidelines.

However, a number of arguments can be made in support of the adoption of administrative guidelines as the vehicle for implementing a freedom of information policy, and these must be addressed. First, it is often argued that the adoption of guidelines would afford the scheme a desirable measure of flexibility, permitting it to adjust to the potentially idiosyncratic information problems of various governmental institutions. Second, it is often argued that freedom of information legislation has been adopted, for the most part, in jurisdictions such as the United States and Sweden, which have constitutional systems different from our own, and might therefore be unsuitable for adoption in Ontario. Third, it is argued that the considerable cost of implementing a statutory right of access augurs against the adoption of this method. We will consider each of these questions in turn.

The view that a freedom of information scheme should be drafted so as to retain a considerable measure of flexibility rests on an assumption that a number of unforeseen problems are likely to develop in applying the provisions of a uniform freedom of information policy throughout the many institutions of a large and complex government structure. We have been concerned, in the course of our inquiry, to determine whether this assumption is warranted either on the basis of the experience of other jurisdictions with freedom of information laws or on the basis of what we have come to learn of the information holdings of the government of Ontario and the needs for confidentiality arising in the context of provincial government. In essence, the question turns on whether it is possible to generalize successfully about the needs of the government for confidentiality and to protect

adequately those interests in a statutory freedom of information scheme. Our inquiries have led us to the conclusion that it is indeed possible to do both. First, it must be appreciated that there is now a considerable body of experience in other jurisdictions which points to areas of contention where conflicts between the public interest in access and the government's need for confidentiality will arise. Second, the overwhelming impression gained from our research inquiries and from the briefs presented by the representatives of the various ministries of the government of Ontario is that the problems anticipated with implementation of a policy of greater openness do not vary substantially from one ministry to the next. A relatively short list of recurring themes arises in the course of discussion of these problems. In subsequent chapters of this report, we will indicate in greater detail our views as to the nature of these interests in confidentiality and how they may be properly safeguarded in statutory provisions.

The second concern relating to the borrowing of foreign models relates to the structural differences between the parliamentary system and the American congressional system, the central features of which we described in an earlier chapter[2]. The most significant distinction is the absence, in the U.S. system, of an equivalent of the parliamentary constitutional convention of ministerial responsibility. In Chapter 5, we described the central features of that convention and indicated our view of its implications for the design of a freedom of information scheme. We repeat here our conclusion that the conventions of the parliamentary system could be adequately accommodated in a freedom of information law by ensuring continuing confidentiality with respect to Cabinet deliberations and the policy advice of public servants.

Apart from considerations of this kind, however, we do not believe that democratic systems based on the parliamentary model are in any other respect unsuited to the adoption of freedom of information laws. A vigorous statement of this view is to be found in the report of the Australian Senate Standing Committee on Constitutional and Legal Affairs on the proposed federal Australian freedom of information legislation:

Freedom of information legislation does not relate to any specific system of government, be it Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving. Any political system which holds that the people are entitled to a maximum degree of information about how their government operates, so that it

can be made more responsible and accountable to them, will welcome an effective Freedom of Information Bill. In this respect a Westminster system of government should be no different from any other[3].

We will return to the problem of tailoring the provisions of a freedom of information law appropriately to the decision-making institutions of a parliamentary government in subsequent chapters of this report.

Finally, we turn to the matter of the costs associated with the enactment of a freedom of information scheme. The difficulty of constructing an appropriate cost-benefit calculus for the enactment of freedom of information legislation was the subject of comment in Chapter 4. As we there noted, there are a number of irreducible barriers to satisfactory calculations in monetary terms either of the benefits of such a scheme or its administrative costs. One simply cannot place a monetary value on the benefits to be secured in a democratic society by increasing the effectiveness of mechanisms ensuring the public accountability and responsiveness of governmental institutions. The costs of introducing a freedom of information law may more easily yield to calculation once in operation. However, as we noted in Chapter 6, the American attempt to estimate administrative costs has been largely unsuccessful; the estimated annual cost of the implementation of the U.S. federal scheme of \$25 million is highly speculative. Any attempt to calculate an equivalent figure for Ontario by discounting in accordance with the difference in population base or by taking into account the extent to which major expenditures are encountered by agencies (such as the U.S. Department of Defence) that have no equivalent in the Ontario government would be even more unreliable a prediction of projected costs.

Although useful cost estimates appear to be unobtainable, there are a number of reasons, in our view, for concluding that administrative costs should not be considered an insurmountable barrier to the adoption of freedom of information legislation. First, if U.S. experience is to any extent a reliable guide, it does suggest that the cost of implementing a freedom of information law will amount to a small fraction of the overall public expenditure on government communications programs[4]. It may be that some of these existing communications resources can be reallocated to the implementation of a freedom of information scheme. Second, as we indicated in Chapter 4, it is quite possible that off-setting savings will be achieved through the implementation of a freedom of information law. Further, though we would not wish to exaggerate the importance of this consideration, the costs of implementation will be borne to some extent

by the payment of fees by individuals exercising rights of access under the scheme. Finally, and most important in the present context, it must be noted that most of the cost of implementing a freedom of information scheme is absorbed in providing administrative facilities for effective response to requests for information. Accordingly, the cost consideration is not of major significance in deciding whether such a scheme should be introduced through administrative guidelines or the adoption of a freedom of information law. If a scheme based exclusively on administrative guidelines is designed so as to provide effective rights of access to the public, its cost would be similar to the cost of implementing a freedom of information law.

In summary, it is our conclusion that policies of greater openness in government information practices should be adopted in Ontario through the enactment of freedom of information legislation.

In the next chapter of this report, we indicate the general nature of our proposed freedom of information scheme. Our recommendations will then be set forth in greater detail in subsequent chapters.

## CHAPTER 9 NOTES

- 1      Reference Re Alberta Statutes, [1938] S.C.R. 100, 132.
- 2      See Chapter 6 of this report.
- 3      Australian Senate Standing Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979) 55.
- 4      For a brief description of Ontario programs of this kind and their estimated cost, see Chapter 8, Section E of this report.

## CHAPTER 10

# The Proposed Legislation: A General View

In designing a freedom of information law, three questions of general significance must be addressed:

- What is the nature of the right to government information?
- How are the needs of the government for confidentiality to be protected?
- What mechanisms for review or appeal of decisions to deny information should be established?

### A. THE NATURE OF THE RIGHT TO GOVERNMENT INFORMATION

The central and animating principle of a freedom of information law should be that the individual is entitled, as of right, to obtain access to government information. Stated this broadly, however, the principle raises a number of important questions.

First, it must be asked whether "any person" should be entitled to exercise this right of access, or whether the right should be restricted to a certain category of persons, such as residents or Canadian citizens, or to persons who have a particular need for the information. Almost all of the freedom of information statutes in place in other jurisdictions confer the right of access on "any person," without adopting limitations of this kind.

We think it unwise to restrict access to persons who can demonstrate a need for the information in question. We accept as a basic premise underlying freedom of information laws the proposition that members of the public should be entitled to have access to government information simply for the purpose of scrutinizing the conduct of public affairs. To require individuals to demonstrate a need for information would erect a barrier to access resulting in unproductive disputes over the nature and value of a particular individual's interest in obtaining access to government information. Nor do we believe that it would be useful to attempt to restrict the right of access to a category of persons having particular citizenship status or residency within the province. In part, our reason for rejecting such a requirement

stems from the difficulty in determining satisfactorily the categories of individuals who should be entitled to access to government information. It is arguable that many persons other than residents of the province can make a legitimate claim for access. For example, former residents, landowners or investors having assets within the province, tourists who have had contact with government agencies while in the province, and persons involved in lawsuits in the Ontario courts may all be thought of as persons with a sufficient connection with the province to warrant the conferral of a right of access to government documents. Further, inasmuch as the freedom of information laws of other Canadian provinces and the United States do not deny access to Ontario residents, it may be inappropriate to restrict the rights of access of residents of those jurisdictions to information of the government of Ontario. The most compelling reason for rejecting the adoption of criteria of this kind, however, is simply that they could not be effectively enforced. A person who was not entitled as of right to access could simply seek the intervention of another person who was so entitled. It would be a tedious and fruitless task to attempt to ensure compliance with status rules. We recommend, therefore, that the right of information be conferred upon "any person" who chooses to exercise rights under the legislation.

A second question to be addressed relates to the definition of "government" for the purposes of a freedom of information law. Although it is our view that the primary focus of a freedom of information law should be those institutions commonly viewed by members of the public as part of "government," there is some difficulty in drawing a dividing line between governmental and non-governmental organizations. We address this problem further in Chapter 11 of this report, and make recommendations for a statutory definition of those governmental institutions that should be subject to a freedom of information law.

Further questions arise when one attempts to define more precisely a "right to information." What is meant in this context by the term "information"? The information rights secured by all freedom of information schemes we have examined confer a right to access to government documents. Thus, the right to information does not embrace a right to require the government to conduct research on matters of interest to citizens in order to provide answers to their questions. Rather, interested individuals are granted the right to see existing documents in the custody of governmental institutions. We believe that it would be impractical to construct any greater right of access to information than this.

How then is the right of access to government documents to be defined? The fundamental obligation typically imposed on governmental institutions by freedom of information laws is to allow interested citizens to see and make copies of documents. Chapter 11 of this report indicates how this obligation should be interpreted in the context of various forms of information storage and retrieval. Further questions arise with respect to the manner in which such rights should be exercised; in Chapter 13, various procedural matters relating to the processing of requests for access will be discussed.

In addition to the obligation to make documents available for inspection and copying, many freedom of information laws impose affirmative duties on governments to publish or otherwise make available to the public certain kinds of information: information that will facilitate the exercise of access rights by individuals, and information relating to policies that may affect a member of the public. We favour the adoption of provisions of this kind, and make recommendations with respect to these questions in Chapter 12 of this report.

#### B. THE NEEDS OF GOVERNMENT FOR CONFIDENTIALITY

If, as we believe, there is a compelling public interest in open government, there is also a compelling public interest in effective government. A rule of absolute openness with respect to government documents would impair the ability of governmental institutions to discharge their responsibilities effectively. All the freedom of information schemes that we have examined recognize this by providing exceptions to the general rule of public access to government-held information. Our examination of freedom of information legislation and proposals from other jurisdictions has led us to two general conclusions about the drafting of such provisions.

First, we believe it is possible to identify the critical needs of government for confidentiality and to state them in a relatively short list of statutory provisions. This method has been adopted in American and Canadian legislation and has been significantly refined in proposals put forward both in Australia and in Canada. The experience of other jurisdictions, together with the wealth of recent literature on this subject, indicates that the range of situations in which the government's interest in confidentiality should be protected does not vary significantly from one jurisdiction to the next. Our research indicates that information identified as being particularly sensitive was almost

invariably of the kind which would be exempt from the general access principle in the freedom of information laws of other jurisdictions.

Second, it is necessary to fashion definitions that will permit confidential treatment of information relating to certain aspects of government policy-making and deliberative processes, law enforcement activity, situations in which the government performs an adversarial role in its dealings with others, and information relating to commercial entities and private persons. We will examine the problems which arise in devising exemptions to deal with these situations, and make detailed recommendations with respect to the form of the exemptions in Chapter 14.

#### C. MECHANISMS OF REVIEW OR APPEAL

It is inevitable that a statutory freedom of information scheme will give rise to disputes with respect to the applicability of its provisions to a particular document. Although it is our expectation that properly drafted exemptions should confine the interpretative problems within reasonable limits, it would be unrealistic to assume that a significant number of disputes between an individual seeking access to records and governmental institutions wishing to deny access will not arise. Some mechanism must be devised for resolving disputes of this kind. The central difficulty in the design of such a mechanism is whether the ultimate decision to release or withhold information should reside with the government of the day or with an independent authority. This we shall discuss in Chapter 15.

#### D. RECOMMENDATIONS

It is our recommendation that freedom of information legislation should embody three essential features:

1. a general right of any person to obtain access to government documents;
2. a list of exempting provisions designed to protect the needs of governmental institutions for confidentiality;
3. an independent and authoritative mechanism for reviewing appeals relating to freedom of information requests.

## CHAPTER 11

# A General Right of Access to Public Documents

### A. INTRODUCTION

In fashioning proposals for a general right of access to public documents, a number of issues arise for consideration. First, what institutions are to be covered by the legislation? Clearly, the departments of the provincial government would be brought within the scope of the legislation. But what of the substantial number of agencies, boards and commissions and other public or quasi-public bodies which might conceivably be included within the scope of such legislation? Second, to what kinds of information or government documents does the right of access adhere? How should the right of access apply to modern forms of information storage and retrieval? Third, what is meant by a "right of access"? Should the individual be entitled only to see government documents, or must there be a right to copy documents as well? Must information, particularly information stored in computerized information systems, be made accessible to the individual in a form which is comprehensible to him? Should documents be translated from one language to another in appropriate cases? Finally, if a particular document contains information which is subject to the right of access, together with information which is not accessible under the statute, should there be an obligation imposed on the government to sever the available information and grant the individual access to it? Each of these questions will be addressed in turn.

### B. WHAT PUBLIC INSTITUTIONS SHOULD BE COVERED BY THE ACT?

We begin with the proposition that the primary purpose of the proposed freedom of information scheme is to facilitate greater accountability of "government" in the broad sense. As we interpret our terms of reference, it is our view that the freedom of information law should apply to those public institutions normally perceived by the public to be a part of the institutional machinery of the Ontario government. This starting point, however, raises as many questions as it answers. Are the courts or the Legislative Assembly properly considered part of the machinery of government? Are the various agencies, boards and commissions established by the government of Ontario considered to be governmental institutions[1]? If so, will this include all Crown corporations, or the governing bodies of the self-regulating

professions? What about agricultural marketing boards, civic hospitals, universities, and local and municipal government institutions? In attempting to define "government" for freedom of information purposes, we considered different possible criteria. U.S. freedom of information laws typically apply only to the executive branch of government, as opposed to the legislative and judicial branches. Could a similar distinction be drawn in Ontario and, if so, what would be the rationale for so doing? A possible criterion might be the organizations' sources of financing. The New Brunswick Right to Information Act, for example, extends to any organization "the operation of which is effected through money appropriated for the purpose or paid out of the Consolidated Fund"[2]. The method of the institution's creation might be considered -- has it been established by statute or order in council? Definitions might be based on some assessment of function or purpose. Governmental organizations might be those whose employees are public servants; or, the notion of public ownership or control of the institution in question might be significant.

As far as public institutions at the provincial level are concerned, we have concluded that two criteria effectively identify what we expect would be, by common understanding, the institutions of the provincial government[3]. First, all the public institutions which are exclusively financed out of the provincial consolidated revenue fund would, we believe, be thought of as governmental institutions. This includes all the various departments of the government and most of the agencies, boards, commissions and Crown corporations established either by statute or by order in council. A number of public institutions, however, are not financed exclusively out of the consolidated revenue fund. For example, some Crown corporations (such as Ontario Hydro) are permitted to raise funds through public borrowing. With respect to organizations that have mixed sources of funding, then, the critical factor should be one of government control, whether that control be effected through ownership of the share capital of the organization, as in the case of some Crown corporations, or exercised through a power to appoint a majority of the members of the governing board or committee. In summary, a public institution which is either wholly financed from the provincial consolidated revenue fund, or controlled by the government (whether through ownership or through a power of appointment), should be considered a governmental institution for the purposes of our freedom of information scheme[4].

Although this definition excludes some organizations which receive extensive public financing, such as hospitals and universities, we feel that it is nonetheless appropriate to so restrict the scope of the proposed legislation. Neither hospitals nor

universities are commonly thought of as institutions of government. Moreover, this Commission has not undertaken research to determine whether there are problems unique to these institutions in granting a general right of access to information. We note, however, with particular reference to universities, that briefs presented to this Commission have offered some support for the view that freedom of information policies should apply to such institutions[5].

The governing bodies of the self-regulating professions and some of the producer-controlled marketing boards, although set up for certain public purposes, have been established in such a way as to preclude them from being subject to the direct control of the government. Again, we believe that such organizations would not be commonly thought of as governmental institutions, and we have not undertaken studies that would enable us to assess the applicability of the freedom of information scheme to non-governmental organizations of this kind[6].

It is also our view that the freedom of information scheme should not be applied to the legislative and judicial branches of government. Both these institutions currently operate under conditions of openness and publicity which render the application of freedom of information laws to them unnecessary. In our court system, the conduct of trials and the hearing of appeals normally takes place in a forum which is open to the public. Decisions of the courts, and the reasons for them, are publicly available. In the legislature, debate is conducted in sessions to which the public is invited. A transcript of the legislative debates is published. Documents which are tabled in the assembly are made available to the public as well. None of the briefs presented to this Commission suggested that access to information in the context of judicial proceedings or the debates of the legislative assembly was a problem which should be addressed through the enactment of a freedom of information law. However, in exempting the legislative and judicial branches of government from our scheme, we would not thereby exempt the administrative and support services of these bodies, nor would we exempt from our proposals ministers of the Crown in their capacity as heads of government departments.

A further question which must be considered is the applicability of our proposals to the Archives of Ontario. In a previous chapter, we briefly described the access policies of the archives[7]. At present, documents which are transferred to the archives remain subject to the confidentiality rules determined by the department or other governmental institution from which they originated. Although it is the policy of the Archives of Ontario to make government records publicly available after thirty years,

the archivist follows the instructions of the originating institution with respect to restricting public access for a longer or shorter period. In short, the rules applying to public access to material in the Archives of Ontario are, in effect, the policies of the originating institution.

We recommend that the policies applicable to the originating institutions under a freedom of information proposal also apply to the documents once they have been transferred to the custody of the Archives of Ontario. We do not believe that there will be a conflict between our proposals and the administrative policy of the archives making documents publicly available after thirty years. As we have indicated, we recommend that the exemptions from the general right of public access to government documents be cast in terms which would permit the government to disclose the exempt documents if they wish to do so. Accordingly, our proposals would not conflict with any existing policies pertaining to archival material. The one exception to this relates to documents containing personal information concerning identifiable individuals. Although some material of this kind will be accessible under our freedom of information proposals, other kinds of personal information will be subject to certain controls which will be discussed in later sections of this report. As will be seen, however, it is our intention to ensure that access to archival material relating to identifiable individuals for research purposes will not be hindered by our proposed privacy protection scheme[8].

Finally, it is our view that local and municipal governmental institutions should be brought within the scope of our freedom of information proposals. The denial of access to information by local government bodies is a phenomenon which has been the subject of comment and briefs presented to this Commission, and of a research study undertaken on our behalf[9]. Our study does not suggest that there are needs for confidentiality on the part of local government institutions dissimilar to those of governmental institutions at the provincial level. Accordingly, we have concluded that the same freedom of information policy should apply to both levels of government. We note that the freedom of information laws passed by state jurisdictions in the United States frequently extend to local government bodies[10]. More important, we draw attention to the brief of the Association of Municipalities of Ontario[11], which indicates general support for the view that freedom of information policies should be applied to municipal government. We appreciate, however, that there may be reasons for embodying freedom of information laws applicable to local government in the separate enabling statutes, such as the Municipal Act[12], under which such bodies are established.

Although we are not persuaded that such an approach is necessary, neither do we see any harm in adopting such a solution.

C. TO WHAT KINDS OF INFORMATION OR DOCUMENTS  
SHOULD ACCESS BE GIVEN?

A common feature of the freedom of information schemes in place in other jurisdictions is that the type of "information" to which access is given is material which is already recorded and in the custody or control of the government institution. Thus, a right to "information" does not embrace the right to require the government institution to provide an answer to a specific question; rather, it is generally interpreted as requiring that access be given to an existing document on which information has been recorded. This is not to say, of course, that the government should feel no obligation to answer questions from the public. Indeed, as we have indicated in an earlier chapter[13], the government of Ontario has committed substantial resources to establishing citizen's inquiry services with this specific objective in view. It would be quite unworkable, however, to grant a legally binding right of access to anything other than information contained in existing documents or records.

For obvious reasons, most freedom of information schemes broadly construe the concept of "document" or "record" to include the various physical forms in which information may be recorded and stored. Thus, the right of access normally extends to all printed materials, maps, photographs, and information recorded on film or in computerized information systems. The breadth of the concept is concisely and adequately captured by the definition of the term "document" set forth in the New Brunswick Right to Information Act:

"Document" includes any record of information, however recorded, whether in printed form, on film, by electronic means or otherwise[14].

We favour the adoption of a similar definition in our proposed scheme.

A more difficult question is whether the right of access should extend to documents created prior to the enactment of the freedom of information law. The schemes which we have examined commonly provide that the right of access should apply to documents in existence at the time the freedom of information law is brought into effect. This is the case with the U.S. legislation, and with the New Brunswick and Nova Scotia freedom of information laws. The granting of access only to documents created after the

enactment of the scheme would substantially delay the implementation of effective rights of public access. Individuals who wish to exercise rights of access in order to assess government programs or more closely understand their own relationship with a particular department or institution would be substantially impaired if they could not gain access to documents which revealed the history of a certain issue or decision-making process. It may be difficult for an individual to assess the conduct of a public institution if he has no knowledge of the previous history of the matter in question. Nonetheless, this feature of the right of access may be expected to meet with some resistance[15]. Accordingly, it may be useful to explore the possible reasons for this resistance and indicate how these concerns will be met by our proposals.

The granting of access to prior documents raises questions of the costs and administrative burdens arising from searches for documents which may not be in active use[16]. The problem of costly searches is, however, common both to prior documents and to documents created long after the enactment of the legislation. Therefore, a general solution must be found to the problem of doing burdensome searches. As will be seen, we include in our proposals suggestions relating to fees and to the nature of document identification which must be provided by the requester. We believe these suggestions adequately respond to these concerns.

A second concern relating to the application of the scheme to prior documents involves the potential disclosure of information which was supplied to the government on the understanding that it would be treated as confidential. Again, this is a concern which also arises in the context of documents created after the enactment of the legislation. We have addressed the problem of granting due recognition to guarantees of confidentiality in the context of exemptions to the general right of access. A related concern may arise with respect to unguarded comments made by public servants prior to the enactment of a freedom of information law in rendering advice to their superiors. This too, however, is a more general problem and, as will be seen, it is our view that documents which disclose the advice given by public servants in the course of their employment should generally be exempt from the access right.

An additional matter worthy of consideration is whether a specific provision should be adopted to deal with requests for access to documents which have been published by the government. The New Brunswick Right to Information Act provides that where the requested information is or will be published, the minister to whom a request has been made shall, in lieu of granting access, refer the individual to the publication or, in the case of a

future publication, indicate the approximate date of availability[17]. We are not persuaded that a specific provision to deal with this matter is necessary. Where such a publication is readily available, the individual making the request would no doubt wish to take advantage of this more convenient mode of access. If the published document is not readily available, however, or if the individual wants only a small portion of a document which is contained in an expensive published volume, we see no reason for refusing to permit the right of access to be exercised in the ordinary way.

#### D. IN WHAT FORM SHOULD ACCESS BE GIVEN?

There are two general questions with respect to the form in which access to information is given. First, should the individual be entitled, as a general rule, to obtain a copy of any document to which the right of access adheres? Second, how should access be given to information stored not in documentary materials, but in computerized information systems or in sound recordings?

With respect to the first point, freedom of information act schemes typically provide that the individual making the request should be entitled to obtain a copy of the document in question. For many documents, particularly those of some length and complexity, the ability of the individual to obtain a copy may be instrumental in the assertion of an effective right of access. Accordingly, we recommend that, as a general rule, a copy of accessible documents be made available to the requester. There are, however, limits to the operation of this principle. The nature of the document may be such that photocopying may be either impractical or harmful to its preservation. Moreover, there may occur unusual cases in which the size or length of the requested document is such that photocopying is not feasible[18]. Normally, the problem of requests for copies of voluminous documents can be solved by the imposition of photocopying and search fees. (We will return to this point in the next chapter of this report.) In addition, the government's obligation to provide copies of documents must accommodate its duty to abide by the Canadian law of copyright. In any case where copyright in the document in question is vested in someone other than the government of Ontario, the government must not be required to provide copies in such a way as to infringe the rights of the copyright owner.

These two limitations were expressed in the proposed federal Canadian freedom of information law, Bill C-15, in the following terms:

No copy of a record or part thereof shall be given under this Act where

- (a) it would not be reasonably practicable to reproduce the record or part thereof by reason of the length or nature of the record; or
- (b) the making of such copy would involve an infringement of copyright other than copyright of Her Majesty in right of Canada[19].

We recommend the adoption of such a provision.

The problem of providing an effective right of access to information stored in non-documentary material has been usefully addressed in the freedom of information bill introduced by the government of Australia. Section 18.1 provides, in part, that

Access to a document may be given to a person in one or more of the following forms:

- ... (c) in the case of a document that is an article or thing from which sounds or individual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images;
- (d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the agency or Minister of a written transcript of the words recorded or contained in the document;...[20]

Section 15 of the bill indicates explicitly how the right of access is to apply to information that is stored in computerized information systems or in sound recordings:

15. (1) Where --

- (a) a request (including a request of the kind described in sub-section 13(3)) is duly made to an agency;
- (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
- (c) the agency could produce a written document containing the information in discrete form by --

- (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
- (ii) the making of a transcript from a sound recording held in the agency,

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

- (2) An agency is not required to comply with sub-section (1) if compliance would interfere unreasonably with the operations of the agency.

In each case, the form of access is appropriately tailored to the storage medium. Again, subject to the limitations of impracticability and copyright infringement, we recommend that similar provisions be adopted in an Ontario freedom of information scheme.

Finally, it must be considered whether a duty should be imposed on the government to provide translation services to requesters who seek access to documents written in a language which is not comprehensible to the requester. This subject is touched on in the New Brunswick Right to Information Act[21] and in the federal Canadian Bill[22]. In both cases, it is stipulated that the government is under no obligation to provide access in a language other than that in which the document is written. In the case of the Canadian bill, it was further proposed that where a record is stored in both official languages of Canada, a person would be given access in the official language of his choice. It is our recommendation that no obligation be imposed on the government under the Ontario scheme to provide translation services.

#### E. THE PRINCIPLE OF "SEGREGABILITY" OR SEVERABILITY

It may frequently be the case that a particular document may contain information which should be accessible to an individual under our freedom of information proposals as well as information which would be exempt from the general rule of access. Most of the freedom of information laws and proposed legislation which we have examined explicitly provide that where the non-exempt material can, with reasonable effort, be segregated or severed from the exempt material, the exempt material should be deleted and the remainder of the document should be disclosed. In the United States, a provision to this effect was introduced in the 1974 amendments to the Freedom of Information Act in response to

complaints that some agencies had adopted the practice of integrating exempt and non-exempt material in a way which would undermine the right of access secured by the act[23]. Although the imposition of a duty to segregate non-exempt material poses obvious administrative burdens, the experience in the United States under the amended provisions does suggest that these burdens can be reduced to some extent by preparing documents in such a way that severance of material in response to a freedom of information act request will easily be accomplished. Where the accessible information cannot be severed with reasonable effort, the document is exempt in its entirety.

A useful model for the wording of a provision of this kind was included in the federal Canadian proposals:

Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution may refuse to disclose under this Act by reason of information contained in the record, the head of the institution shall disclose any part of the record that does not contain any such information and can reasonably be severed from any part containing such information[24].

The severance of exempt information may serve to increase the level of access accorded under the statute in a number of areas. For example, individuals seeking access to files containing personal information for research purposes frequently would be satisfied to be given access to documents containing such information after the advice and recommendations of public servants contained in such documents have been deleted. (In some cases, of course, factual discussion and evaluative or advisory opinions will be integrated in such a way that severance is not feasible.)

We recommend that a provision be included in the Ontario scheme to ensure that reasonable efforts to effect a severance will be undertaken.

#### F. RECOMMENDATIONS

1. Subject to the exemptions hereinafter discussed, the duty to provide access to information to the public should be imposed on all institutions of government and, in particular, should apply to all departments, boards, commissions, corporations, or other public bodies that are either:
  - a. financed exclusively from the consolidated revenue fund of the province of Ontario, or

- b. controlled by the government either through ownership of fifty per cent or more of the issued and outstanding shares in a corporate body or through having the power of appointment of a majority of the board of directors or other governing body or committee of the institution in question.
- 2. The freedom of information scheme should not apply to the proceedings of the Legislative Assembly nor to the judicial functions of the courts but their administrative and support services should be brought within the scope of the act.
- 3. Documents that have been transferred to the Archives of Ontario should be subject to the public right of access set forth in our proposals.
- 4. The freedom of information scheme should also apply to the institutions of local and municipal government.
- 5. The right of access should extend to information contained in existing records. The notion of existing records of "documents" should be broadly defined to include modern forms of information storage and retrieval. The term "document" should be defined to include "any record of information, however recorded, whether in printed form, on film, by electronic means or otherwise."
- 6. The right of access should not be restricted to documents which come into existence after the implementation of the freedom of information scheme.
- 7. It is not necessary to set forth a specific statutory rule to deal with situations in which the information has been made available to the public in a published volume.
- 8. As a general rule, the individual should be entitled to obtain a copy of any document to which the right of access extends, except in situations where either:
  - a. it would not be reasonably practicable to reproduce the record or part thereof by reason of the length or nature of the record; or
  - b. the making of such copy would involve an infringement of copyright other than copyright of Her Majesty in right of Ontario.
- 9. Appropriate forms of access should be established for materials such as films, sound recordings, and computerized information systems. The proposals of the federal Australian

Freedom of Information Bill 1978 provide a useful model with respect to these questions.

10. The government should be required to produce a copy of the original document with no burden of translation.
11. Where a request is made for access to a document that contains, in part, information exempt from the general right to access, the governmental institution involved should make reasonable efforts to sever non-exempt material from the document.

## CHAPTER 11 NOTES

- 1 A study undertaken for the Ontario Economic Council lists 292 such institutions. See Ontario Economic Council, Government Regulation (Toronto, 1978) 207-275.
- 2 S.N.B. 1978, c. R-10.3, s. 1(d).
- 3 In reaching these views, we have benefited from an examination of provincial experience under The Audit Act, S.O. 1977, c. 61. We are grateful to the Provincial Auditor of Ontario, Mr. F.N. Scott, for his helpful discussions of these matters.
- 4 These are the principal criteria used by the Office of the Provincial Auditor to identify the public institutions for purposes of conducting audits under The Audit Act. Pursuant to the provisions of that act, however, the auditor is granted powers to audit the accounts of any recipient of a grant from the consolidated revenue fund. This would include private corporations and other non-governmental organizations. Accordingly, it is not possible to identify governmental institutions simply by defining them as institutions which are subject to inspection by the provincial auditor.
- 5 Carleton University, Brief No. 65; Queen's University, Brief No. 57; Ontario Confederation of University Faculty Associations, Brief No. 52.
- 6 The public regulation of professional groups is currently under study by a committee established by the Attorney General of Ontario. A staff report has been published. See M.J. Trebilcock, C.J. Touhy and A.D. Wolfson, Professional Regulation (Toronto: Ministry of the Attorney General, 1979).
- 7 See Chapter 8, Section G.
- 8 See generally Volume 3 of this report, especially Chapter 33, Sections D and F.
- 9 S.M. Makuch and J. Jackson, Freedom of Information in Local Government in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 7, 1979), cited hereafter as Makuch and Jackson.
- 10 See Chapter 6, Section C of this report.
- 11 Brief No. 90.

- 12 R.S.O. 1970, c. 284. This approach is advocated, for example, in Makuch and Jackson.
- 13 See Chapter 8, Section E.
- 14 S.N.B. 1978, c. R-10.3, s. 1.
- 15 Section 10.2 of the Australian federal Freedom of Information Bill, 1978, generally denies access to prior documents. It has, however, been vigorously criticized on this point. See J. McMillan, "Freedom of Information: Issue Closed," [1977] 8 Fed. L.R. 379, and Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979) 167.
- 16 Ibid., 167. The Australian Senate Committee report suggests that this is the major rationale for the inclusion of section 10.2 in the federal bill.
- 17 S.N.B. 1978, c. R-10.3, s. 4(1).
- 18 Cf. Irons v. Schuyler, (1972), 465 F. 2d 608 (D.C. Cir.) where a request for all unpublished decisions of the patent office, requiring a potential search of millions of files, was denied.
- 19 Canada, Bill C-15, 31st Parliament, 28 Elizabeth II, 1979 (first reading, October 24, 1979) s. 12(2), hereafter cited as Bill C-15.
- 20 Australia, Freedom of Information Bill 1978.
- 21 S.N.B., 1978, c. R-10.3, s. 4(3).
- 22 Bill C-15, s. 12(3).
- 23 See U.S. Senate and House of Representatives, "1975 Source Book on Freedom of Information Act," Legislative History of the Freedom of Information Act and Amendments of 1974 (Washington: USGPO, 1975), 451.
- 24 Bill C-15, s. 26.

## CHAPTER 12

# Obligations on Government

### INTRODUCTION

The basic principle of a freedom of information law is the imposition of a duty on government to grant individual members of the public a right of access to government documents. The obligation imposed is, in essence, one of responding to requests for information directed to governmental institutions by individuals exercising their statutory rights. There is a further and different kind of obligation imposed on government in a number of freedom of information laws and proposals found in other jurisdictions: governments are obliged to publish or otherwise make available to the public certain kinds of information, regardless of whether the document in question has been the subject of a specific request. Our recommendations with respect to these kinds of obligations form the subject matter of this chapter.

These affirmative duties to publish or make available certain kinds of information typically relate to two different types of material. First, government institutions are often required to publish directory information which will be of assistance to individuals attempting to formulate requests for information in exercise of their statutory rights. Thus, government departments are required to publish information relating to their organizational structure and program functions, together with an indication of the manner in which requests for information are administered by the department in question. Second, obligations are typically imposed to publish or otherwise make available the "internal law" of government departments. The phrase "internal law" refers to documents such as staff manuals, guidelines, departmental policy statements and other written materials which are used by public servants in making decisions -- such as a decision to grant or deny a benefit of some kind to an applicant -- in the course of administering government programs. As we have indicated in an earlier chapter[1], such materials do not constitute "law" in the full sense. Nonetheless they may effectively govern the manner in which decisions are made with respect to determinations affecting individual citizens. The general unavailability of this kind of material in the United States prior to the enactment of the Freedom of Information Act (FOIA) was often referred to as the "secret law" problem.

Comprehensive requirements for the publication both of directory information and of internal law were introduced in the 1966 U.S. Freedom of Information Act and have generally been regarded as a successful feature of the U.S. scheme. Proposals to the same general effect are contained in the Freedom of Information Bill of 1978 introduced by the federal government of Australia[2]. Our own recommendations with respect to the publication of directory material and internal law are set forth below.

#### A. DIRECTORY INFORMATION

In order to ensure that the rights of access granted under a freedom of information scheme are understood by interested citizens, steps must be taken to ensure that individuals may, with relative ease, know how rights under the act may be exercised and the organizational structure of the government so that they can direct their inquiries to the appropriate institution. Accordingly, we recommend a general directory of information be published to assist the citizen to locate the government-held information he requires.

Some consideration must also be given to the possibility of describing the classes or types or documents under the control of each governmental institution. Obviously, a description of this kind might enhance the ability of individuals to effectively exercise their information access rights. The federal Canadian bill specifically requires that "a description of all classes of records under the control of each governmental institution in sufficient detail to facilitate the exercise of the right of access" should be included in the required annual publication. We have not included a recommendation along these lines, however, as we have some concern that the cost of preparing and publishing such an index may outweigh the degree of improvement in the ability of individuals to exercise their statutory rights of access. On the other hand, as we have indicated in an earlier chapter[3], the government of Ontario has embarked on a records management program, one feature of which is to create a "record schedule" for each record series maintained by the government. A compilation of these record schedules would perhaps approximate the type of description required under the proposed Canadian legislation. Moreover, the indexes to filing systems maintained by many government institutions would provide a useful starting point for the preparation of a listing of this kind. We feel that this is also an area in which some experimentation may be useful. A list of the titles of file series may not be particularly helpful to an interested citizen attempting to formulate an access request; it may well be that a narrative description of the kinds of records typically generated by a particular institution in the

course of its work would provide greater assistance. As will be indicated in a later chapter of this report, it is our view that an inventory of government data banks containing personal information about individuals should be published on an annual basis. We believe that the publication of precise information concerning this kind of data system is desirable. We do not think that the publication of detailed information concerning all other government filing systems is a matter of equally pressing concern. However, in the course of preparing an inventory of personal data banks, it may be feasible to produce more general information about government-held files which would be of use to individuals exercising their rights of access under the freedom of information scheme.

#### B. INTERNAL OR SECRET LAW

In Ontario, as in many other jurisdictions, it is well accepted that public knowledge of legislative enactments is an essential condition for the operation of democratic institutions. The fundamental principle underlying the requirement of publicity with respect to both legislation and subordinate legislation was forcefully and clearly articulated in 1968 in the Report of the Royal Commission of Inquiry into Civil Rights (the McRuer Report) in the following terms:

It is an unjustified encroachment on the rights of the individual to be bound by an unpublished law[4].

The normal legislative process ensures that laws enacted by the legislature are subjected to public scrutiny and debate prior to passage and are made available in published form upon their enactment. The publication of subordinate legislation is ensured by the provisions of The Ontario Regulations Act[5] to the extent that it comes within that act. The act requires that such regulations be published in the Ontario Gazette within one month of filing with the Registrar of Regulations[6]. The term "regulation" is defined in the act in the following terms:

"Regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include [certain exempted categories of regulations][7].

As the McRuer Report noted, however, the definition of "regulation" in the Regulations Act, broad though it may be, does not

cover all bodies to whom legislative powers have been delegated by the Ontario legislature. The governing bodies of professions or occupations and local agricultural marketing boards established pursuant to the provisions of the Ontario Farm Products Marketing Act[8] are not covered by the act. The members of these bodies are not appointed by the Lieutenant Governor in Council and are therefore excluded from the statutory definition. The McRuer Report recommended that the subordinate legislation of these bodies should be subject to similar requirements of publicity. And, although provisions have been enacted to ensure that this is the case with respect to the governing bodies of professions[9], there do not yet appear to be such requirements with respect to the subordinate legislation of agricultural marketing boards[10]. In our view, it would be useful to ensure that matters of this kind could be kept under review by an administrative official -- the Director of Fair Information Practices -- with a view to ensuring that the principles articulated in the McRuer Report are applied by all bodies to whom powers to enact legislation have been delegated. (The role of the Director of Fair Information Practices will be described later in our report.)

In the main, then, the principle that all legislative enactments, including subordinate legislation, should be placed in the public domain has been effectively implemented in Ontario. The rationale underlying this principle, in part, is the belief that it would be unjust to allow the rights of individuals to be determined by laws of which they could not possibly be aware. Thus, in the case of delegated legislation, The Regulations Act provides that "a regulation that is not published is not effective against a person who has not had actual notice of it"[11].

It is our view that this fundamental principle and its underlying rationale should be extended to apply to the material we have referred to as "internal law," such as staff manuals, guidelines, policy statements, and other written materials used by government personnel in making decisions affecting individuals. Although such materials do not constitute "law" in the traditional sense, they do contain rules and policies that effectively determine the rights of individuals.

The pressures of modern government administration that have led to the development of such materials are easily understood. Statutory schemes often confer discretionary powers on public officials. For example, a number of statutory schemes enacted by the government of Ontario enable public officials to grant certain benefits to individuals in certain broadly defined circumstances. It then becomes necessary for the official (or, more probably, the officials) to whom the power to decide is delegated to apply the broad statutory standards to the factual circumstances of

individual applicants. Illustrations of this phenomenon drawn from the workmen's compensation and social assistance fields are described in Commission research publications[12]. The large volume of decisions required by such schemes, the need to delegate decision-making power to a substantial number of public servants, and the desire to ensure some uniformity in the decisions made in particular cases have led government departments to develop interpretative manuals and guidelines which indicate to the decision maker how the discretion should generally be exercised. Such materials may not be "binding" on the decision maker in the sense that they preclude the exercise of some discretion in their application. However, in many cases the application of these internally developed criteria to the facts at hand will settle the matter in issue.

The development of techniques which conduce to uniformity and evenhandedness in the exercise of discretionary powers is, of course, a laudable objective. We do not question the need for or value of interpretative materials of this kind. However, we find the current practice of enshrouding such materials in secrecy unacceptable.

Two compelling reasons underlie our concern to make the internal law of government institutions available to the public. First, the use of secret internal law means that decisions concerning the rights and liabilities of individuals are influenced by standards or policies of which the individuals are completely unaware. The application of these criteria may effectively determine the outcome of a particular decision-making process. A failure to disclose secret law to persons affected is an affront to the basic principles of fairness and due process. Second, the publicity accorded to statutes and regulations ensures that those who are responsible for the enactment of legislation may be held politically accountable for the public policy which they seek to implement. A similar process of evaluation and accountability cannot occur with respect to documents which remain hidden from public view.

In the background is another factor that should be mentioned. There are intrinsic limits on the ability of legislation to determine the application of particular policies to factual circumstances. In many situations, it will be either undesirable or impossible to draft statutes and regulations containing codes or rules which adequately anticipate all the possible fact situations to which the statute must be applied. In addition, reasonable people may differ over the precise meaning to be accorded to many statutory provisions. In such cases, public servants who are required to apply statutory criteria must attempt to interpret these criteria. If this process of interpretation is inevitable,

however, it is not inevitable that it be carried out in conditions of secrecy.

It is our conclusion that measures should be adopted which will ensure that a certain level of publicity is accorded to internal law. The U.S. Freedom of Information Act has adopted a scheme which requires that two different levels of publicity be accorded to these materials. Section 552 (a)(1)(D) requires that the following materials be published in the Federal Register:

Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

Lesser burdens are imposed with respect to three additional categories of material. Section 552(a)(2) requires that the following classes of information be made available for inspection and copying unless the materials are promptly published and offered for sale:

- a. final opinions, orders, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- b. statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- c. administrative staff manuals and instructions to staff that affect a member of the public.

Materials required to be made available under this subsection must be indexed. The indexes must be published and distributed at least quarterly. If publication would be "unnecessary and impracticable," the agency must provide copies of the index at cost or less.

There are two features of the U.S. scheme which should not, in our view, be adopted in an Ontario scheme. First, the requirement of publication (in Ontario terms in the Ontario Gazette) seems to us to be an unnecessarily burdensome and costly method of making this material available to the public. Second, it is clearly the case, as is provided in the U.S. act, that it would be unreasonable to require the publishing of all internal law in the Federal Register. Yet, it is evidently difficult to articulate a statutory standard which will identify only the most important forms of internal law. Thus, the U.S. act requires that "substantive rules of general applicability" be published in the Register

whereas "statements of policy and interpretation which have been adopted by the agency" need only be made available for inspection and copying. The distinction between these two kinds of materials is less than abundantly clear. One leading commentator has noted that "even though the question of what must be published is so highly practical, the meaning of the FOIA on this question remains about as vague after more than a decade as it was when it was enacted"[13].

A preferable approach would be to require that all internal law simply be made available for inspection and copying, and that notices indicating its general nature and the locations at which it can be inspected be published in the Ontario Gazette. This is, in essence, the scheme adopted in the federal Australian Freedom of Information Bill. It is there required that copies of the following kinds of documents be made available for inspection and copying:

...documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments to or for which persons are or may be entitled or subject, being --

- a. manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or
- b. documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

The provisions further require that an annual notice must be published in the Gazette specifying the documents of which copies are available and the places where copies may be inspected and purchased. We favour the adoption of such a scheme as part of our proposed freedom of information law. We note, however, that in the case of "precedents," the deletion of information identifying named individuals may be necessary to avoid invasion of privacy. Further, there may be other situations in which material that would otherwise be exempt from the general rule of access should not be exposed. The Australian proposals provide for these contingencies by stipulating that where material subject to these requirements of publicity contains items of information which

would be exempt from the general principle of access secured by the freedom of information scheme, the institution should, where practicable, publish a version of the material from which such items have been deleted.

The problems associated with the availability of the material referred to in the U.S. scheme as "final opinions, orders, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," are not fully resolved in the Australian proposals, in our view. The Australian provision requires only that "precedents" be made available for inspection and copying, presumably on the basis that only previous orders that are treated by the decision maker as sources of guidance in future cases should be considered to be internal law. We feel, however, that there is some value in making the decisional law of government decision makers more broadly available. Accordingly, we recommend that all decisions of government institutions of the kind referred to in the language quoted from the U.S. act should be made available for inspection and copying. The reasons for this are as follows. It is quite possible that an examination of decisions which the government institution does not consider to be of precedential value might nonetheless reveal useful information relating to the manner in which the institution exercises its statutory powers. Accordingly, interested individuals might wish to undertake an analysis of the decisions of a government institution and the reasons underlying them, either for the purposes of determining what interpretations are likely to be applied by the agency in a particular case in which the individual is involved, or, more generally, as a means of scrutinizing the manner in which the agency is fulfilling its statutory mandate. In view of the enormous case load of some government institutions, it would be impractical to require publication of indexes of all decisions, regardless of their precedential value, in the Ontario Gazette. Indexes to these materials should, however, be prepared and made available for inspection and copying.

Finally, attention must be drawn to the question of whether internal law that remains secret because of a failure on the part of a governmental institution to comply with these requirements of publicity should be allowed to have an impact on the rights of individuals. As we have noted above, Ontario, in common with many other jurisdictions, denies effect to subordinate legislation which has not been published, unless the individual has had actual notice of the regulation in question. In the U.S. FOIA and the Australian proposals, this principle has been extended in its application to internal law. We share the view that a similar consequence should flow from failure to make internal law available for inspection and copying and we so recommend.

### C. RECOMMENDATIONS

1. There should be a general directory of information to assist the citizen to locate the government-held information he requires.
2. A period of experimentation in developing materials providing useful descriptions of government information holdings to assist interested individuals in formulating requests for information under the freedom of information law should be undertaken.
3. The "internal law" of governmental institutions should be made available to the public for inspection and copying, and notices indicating its general nature and the locations at which it can be inspected should be published in the Ontario Gazette. The kinds of materials to which this requirement should apply are usefully defined in the Australian Freedom of Information Bill in the following terms:

...documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments to or for which persons are or may be entitled or subject, being --

- a. manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or
- b. documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

4. Apart from precedents which must be made available for inspection and copying in accord with the above recommendations, and the decisions and reasons therefor of government institutions made in the adjudication of cases, indexes to these materials should also be prepared and made available to the public. Neither the decisions nor the indexes of this material need be published in the Ontario Gazette.

5. Where compliance with the above requirements would involve the disclosure of information that would otherwise be exempt from the general rule of public access (as, for example, the case of "precedents" arising in the context of decision making with respect to social assistance applications which might contain sensitive personal information) the governmental institution should, where practicable, publish a version of the material from which such items have been deleted.
6. Rules or policies contained in materials of the kind described in paragraph 3 above should not be permitted to adversely affect an individual if the governmental institution in question has failed to comply with these publicity requirements, unless the individual has had actual notice of the rule or policy in question.

## CHAPTER 12 NOTES

- 1 See Chapter 8, Section C, of this report.
- 2 Australia, Freedom of Information Bill, 1978, ss. 6, 7, and 8.
- 3 See Chapter 8, Section F, of this report.
- 4 McRuer Report, Vol. 1, 361.
- 5 R.S.O. 1970, c. 410.
- 6 Ibid., s. 5.
- 7 Ibid., s. 1(d).
- 8 Farm Products Marketing Act, R.S.O. 1970, c. 162 as amended.
- 9 See, for example, The Law Society Act, R.S.O. 1970, c. 238, s. 54(3).
- 10 It is also of interest to note that recent amendments to The Milk Act (R.S.O. 1970 c. 273 as amended) and The Farm Products Marketing Act expressly provide that the rulings of boards relating to quotas shall be deemed to be "of an administrative and not of a legislative nature." See The Milk Act, s. 8(7a); The Farm Products Marketing Act, s. 8(7). Provisions of this kind exclude the rules in question from the Regulations Act definition of "regulations" and therefore should not be used where the rules are, in substance, legislative in character.
- 11 S. 5(3).
- 12 T.G. Ison, Information Access and the Workmen's Compensation Board (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 4, 1979); L. Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979).
- 13 K.C. Davis, Administrative Law Treatise, Vol. 1 (1978) 341.



## CHAPTER 13

# Procedural Matters

### A. INTRODUCTION

Procedural questions have received considerable attention in public discussions concerning freedom of information in recent years[1]. American experience prior to the 1974 amendments to the Freedom of Information Act (FOIA) offers evidence of the significance of procedure. The 1966 act had been virtually silent on procedural aspects of the right of access. Frequent complaints were raised in the congressional hearings relating to the implementation of the 1966 act that a variety of procedural abuses had occurred. Allegations were made that delay, intentional concealment, excessive fees, and onerous identification requirements prevented access in defiance of the statute's intent[2]. Many of the 1974 amendments to the act responded to these concerns.

It is not our view that such abuses are likely to become a reality in Ontario. Indeed, our primary concerns are to ensure that the proposed freedom of information law will spell out a code of procedures revealing the basic machinery for processing requests for access to information to all who read the legislation and, further, to ensure that uniform procedures are followed throughout the various departments and institutions of government. It would be impossible to set forth detailed statutory rules specifying precisely how each governmental institution should process requests. Nonetheless, it is possible and desirable to provide a minimum code of fair procedures with which all such institutions should comply. More detailed procedures may then be tailored to the specific organizational structure of particular units of government and, in accordance with the recommendations in the previous chapter, be made available to the public.

The statutory procedural rules should deal with the following matters:

- form of the request;
- transfer of the request;
- to whom a request should be made;
- time limits;
- denial of access;
- fees.

## B. THE FORM OF THE REQUEST

Two questions must be addressed under this heading. First, must the request be made in writing? Second, how detailed an identification of the document must be set out in the request?

The first question is not dealt with uniformly in the statutory schemes we have examined; written requests are usually required to invoke the statutory right of access. The U.S. act does not expressly deal with the issue as to whether requests are to be oral or written, and accordingly both are apparently permissible under the act[3]. However, published agency procedures, with which the requester must comply, normally require a written request. The Nova Scotia act specifically allows an initial request to be made by telephone[4]. If the requester wishes to trigger rights of review and appeal under the act, however, a subsequent request must be made in writing[5]. The federal Canadian[6] and Australian[7] proposals specifically require that a request for access under the act must be made in writing.

Obviously, oral requests are more simple and expeditious matters for the requester. Further, government institutions currently respond to oral requests, and a freedom of information statute should not have the effect of needlessly formalizing existing practices. However, we think it is desirable to invoke our proposed appeal mechanisms only in response to written requests. It is difficult to conceive of a workable administrative procedure in which statutory obligations, some of them subject to time limits and rights of appeal, would be imposed on public officials on the basis of telephone inquiries and oral requests. Of course, nothing in the proposed legislation should preclude individuals from making such requests or the government from responding to them. The making of such an inquiry would not, however, constitute an exercise of the statutory right of access secured in our scheme.

The statute should also indicate how detailed or precise the request must be in its identification of the requested document. Clearly, a statutory burden to search for documents should be premised on a requirement that the description of the requested information is sufficient to make such a search feasible. On the other hand, it must be recognized that the individual making the request may have little idea of the nature of the departmental filing systems or methods of identifying documents or files. A satisfactory resolution of these difficulties, in our view, is to require that the request provide sufficient information about the requested document to enable an employee of the department who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.

The foregoing standard corresponds to the identification requirements imposed on individuals making requests under the U.S. act[8]. A similar requirement is to be found in the New Brunswick act and in the Australian and Canadian proposals. Only the Nova Scotia act provides that applicants must identify the requested material "precisely"[9].

Both the Australian bill[10] and the New Brunswick act[11] impose an additional duty aimed at facilitating requests. If any agency receives an inadequate request, it must assist an applicant in making a proper one. Moreover, the Australian statute provides that an agency cannot refuse to comply with a request because it does not have the requisite specificity unless it has first afforded the applicant an opportunity to obtain assistance in preparing the request properly. The adoption of such practices would do much to enhance the ability of individuals who are unfamiliar with government organization and record keeping to exercise rights of access. We recommend, therefore, that the statute should provide that if a request does not reasonably describe the records sought, the government institution should inform the applicant of the defect and offer assistance in reformulating the request to comply with the act.

#### C. TRANSFER OF REQUESTS

Individuals who are not familiar with the organizational structure of the government may not know where to send a particular request. Accordingly, consideration should be given to the adoption of a requirement that governmental institutions assist the applicant by redirecting requests to the appropriate person or department.

In our view, it would be desirable to include a provision in the statute that requires each institution either to forward a request to the proper recipient or to tell the applicant where he should apply. A provision to this general effect is set forth in the New Brunswick act. A minister who has received a misdirected information request is required to notify the applicant of the correct location[12]. Similarly, the federal Australian bill provides that where a request for a document is received by an agency that does not possess it, the recipient may transfer the request to the appropriate person or department and notify the applicant[13]. It is our recommendation that government institutions be permitted to adopt either solution to the problem of misdirected requests.

#### D. TO WHOM SHOULD A REQUEST BE MADE?

We do not feel that it is desirable to stipulate that requests should be made to a particular named official or governmental unit. The making of requests would be unnecessarily encumbered by such a provision, the general nature of which might not be widely known by individuals seeking access to government documents. Thus, an individual attempting to exercise freedom of information requests should be permitted to address written requests either to the institution or to named officials within the institution.

#### E. TIME LIMITS

Effective implementation of a freedom of information statute is encouraged by the adoption of time limits within which responses to requests should be made. Failure to respond within the prescribed period would be deemed to be a denial of access and would permit the requester to invoke appeal procedures.

The U.S. Freedom of Information Act of 1967 provided simply that an agency must make records in question "promptly available" to an applicant. No other standards with respect to the timeliness of response were imposed. During the 1972 congressional hearings on the administration of the act, the most pervasive complaint about agency practices related to reported inordinate delay in processing requests. The House Committee on Government Operations concluded that "delay by most federal agencies in responding to individual requests for public records under the Freedom of Information Act, or delay in acting on an administrative appeal frequently negated the purpose of the Act" [14]. To curtail these abuses, the FOIA was amended to impose strict time limits for completion of agency duties. The act now provides that an initial determination be made within ten working days of receipt of the request. In case of an appeal from an initial denial, a determination of the appeal is to be made by the agency within twenty working days after receipt of the appeal.

Other freedom of information statutes and proposals reflect the view that precise time limits are useful in facilitating effective public access. The Ontario legislation should contain a specific time limit within which a request must be processed. However, while the time limits should promote expeditious determination, they should not impose onerous administrative burdens on government. A maximum period of thirty calendar days is recommended. This would normally permit the institution in question to make an initial decision and engage in some form of internal review. We further recommend that the statutory time period be

reconsidered and reduced once appropriate administrative machinery for dealing with requests has been developed, and experience in implementing the statutory provisions has been acquired.

Situations may arise, however, in which it will be impossible to comply with the thirty-day time limit. A number of schemes provide explicitly for these contingencies by permitting a period of delay in certain circumstances. The model bill prepared by the Canadian Bar Association offers a useful illustration of this type of provision. Delay is permitted:

- a. to obtain the document from an office of that agency which is located separate from the office processing the request;
- b. to search for or appropriately examine a large number of documents included within the request; or
- c. to consult with
  - i. another office of that agency which is located separate from the office processing the request;
  - ii. another agency; or
  - iii. a person having a substantial interest in the document requested[15].

Again, however, it is desirable to impose a limit on the time for such delay. A further period of thirty calendar days is recommended as the maximum. Failure to respond within that period should be deemed to be a refusal of access giving rise to rights of appeal.

Where requested information is readily accessible, of course, the institution will be able to respond to requests well within the stipulated time periods. Any tendency in the practice of a particular institution to allow these maxima to become a standard period for processing requests could become the subject of investigation and comment by the Director of Fair Information Practices.

#### F. DENIALS

When a requester has been denied access, it is important that he be advised of the reasons for the refusal. He can then make an informed decision as to whether he wishes to obtain an independent review of the decision. Freedom of information statutes typically

require agencies to provide information in varying detail when access is refused[16]. The following types of information should appear in such notices:

1. the statutory provision under which access is refused;
2. an explanation of the basis for the conclusion that the information sought is covered by an exempting provision;
3. the availability of further review and how it can be pursued;
4. the name and office of the person responsible for making the decision.

Although the obligation to provide reasons for denials may appear to be burdensome, we believe that it will be instrumental in encouraging careful determinations of decisions to deny access. Further, conscientious explanations of the basis for refusal may reduce the number of situations in which the exercise of appeal rights will be thought to be necessary. Under our proposed scheme, the persons responsible for making decisions to deny access will be public servants to whom this task has specifically been assigned. The identity of the decision maker in a particular case should be made known to the requester in order that a clarification of the decision may be sought directly from him, and in order to facilitate subsequent review of the decision.

A particular problem relating to notice with respect to denials arises in the context of law enforcement information. There appear to be situations in which it is necessary to permit law enforcement authorities to refuse to disclose whether a particular document exists. Thus, an individual engaged in criminal activity might simply wish to know whether an investigative file concerning him has been established. We will return to a consideration of this problem in the context of our discussion of the exemptions to the general rule of access pertaining to law enforcement information[17].

#### G. FEES

The administration of a freedom of information act will incur certain expenses. Locating requested information, making it comprehensible when it is stored in non-documentary form and providing copies will involve material and labour costs. All the freedom of information schemes which we have examined have accepted the general principle of a user charge. We have concluded that individuals seeking access to public documents can fairly be

required to bear some of the administrative costs involved in responding to their requests.

Although it is not feasible to establish in a statute a schedule of fees which will satisfactorily determine precisely how much should be charged in each circumstance, it is both possible and desirable to establish statutory rules stipulating the manner in which fees are to be calculated. In particular, the nature of the costs to be charged to the requestor, standards limiting the assessment, and provisions for waiver of fees in the public interest should be set out in the statute. Again, U.S. experience under the FOIA prior to the 1974 amendments suggests that the granting of a broad discretionary power to assess fees can seriously undermine the effectiveness of a freedom of information scheme. Federal agencies are reported to have abused their power by imposing excessive fees in order to discourage requests[18]. The 1974 amendments reduced agency discretion and replaced it with some objective statutory guidelines.

The initial question to be addressed is the nature of the administrative costs for which the individual making the request should be charged. Prior to 1974, some U.S. federal agencies imposed charges reflecting all costs, both direct and indirect, of processing requests. Thus, some agencies' fee schedules included an allowance for the general administrative overhead costs of the agency. The 1974 amendments restricted permissible charges to the "reasonable standard charges for document search and duplication"[19]. We are in general agreement with this approach. To the extent that there are other calculable overhead charges associated with a freedom of information scheme, it is not unreasonable that they should be absorbed in the general administrative costs of the institution in question. The cost of providing "copies" must, of course, be interpreted appropriately in the context of computer-stored information. Hourly charges for the time of the personnel involved and additional direct costs to the institution resulting from the use of the computer system should be assessable.

It should be noted, however, that these proposals do not contemplate that institutions must impose search and copying charges. There may be institutional settings in which the granting of access to documents imposes minimal burdens or is an incidental part of the ongoing work of the institution. Further, the likely requesters of information relating to a particular government program may typically be individuals in financial need. For these and perhaps other reasons, institutions may provide information free of charge. Our proposals would not inhibit such practices.

A number of ancillary questions must be considered. Should the statute permit agencies to charge fees in all cases, or should the statute require waiver or reduction in certain circumstances? Should costs be levied for unsuccessful applications? Should a requester receive prior notification of substantial charges? Should there be a discretion to require an individual to make a deposit to assure payment of such charges?

With respect to the first question, we have concluded that the statute should explicitly provide for waiver or reduction of fees when provision of the information can be considered as primarily benefiting the general public. Criteria for the exercise of this discretion should include the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the disclosure may further, the usefulness of the material to be released, and the likelihood that a tangible public good will be realized[20].

With respect to the second question, we have concluded that requesters should not be assessed for unsuccessful applications. Although the U.S. act does permit search fees to be assessed even when the records described in the request do not exist or when the records found are exempt from disclosure, the U.S. Attorney General has recommended that agencies not charge fees in these circumstances unless prior notice to this effect has been given[21]. We believe that this would accord with the reasonable expectations of the individual making the request and therefore propose as a general rule that there be no requirement to pay a fee until an agency is ready to disclose a requested document.

There may, however, be circumstances in which it is reasonable to assess and require a fee prior to the disclosure of a requested document. Certain requests may entail substantial efforts to discover whether the requested information exists. If fees cannot be charged for unsuccessful applications, the government and ultimately the public could be required to bear the costs of extensive searches for material, the disclosure of which may not be a matter of general public concern. Accordingly, we propose that where the cost of processing a request will be substantial, governmental institutions should be permitted to demand a deposit if the anticipated cost will exceed a prescribed amount, such as \$50.00.

There is a further problem related to the timing of fee assessments. Members of the public should be protected from unwittingly incurring obligations that far exceed their expectations. If during the document search it becomes apparent that substantial fees may be incurred, it would be fair and reasonable

to advise the requester before proceeding further to ensure that the cost will be acceptable to him.

The final issue to be considered in relation to fees is whether charges assessed under the statute are subject to review or appeal. In our view, all matters relating to fees should be subject to review by the Director of Fair Information Practices. With this in mind, it is our further recommendation that a written statement indicating the method by which fees have been assessed be furnished by the government institution on request.

#### H. RECOMMENDATIONS

1. A request for information made in the exercise of rights conferred by the freedom of information legislation should be made in writing.
2. To be effective, the request must provide sufficient information about the requested document to enable an employee of the department who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.
3. If a request does not reasonably describe the record sought, the governmental institution in question should inform the applicant of the defect and offer assistance in reformulating the request so as to comply with the legal requirement of specificity.
4. Where a request for a document is received by a governmental institution which does not possess it, the institution must either:
  - a. notify the requester of the correct location of the document, or
  - b. transfer the request to the appropriate institution and notify the requester that this action has been taken.
5. The statute should not provide that a request, in order to be effective, must be directed to a particular public official. It should be possible to forward requests either to the institution or to any of the employees of the institution.
6. Governmental institutions to which requests have been forwarded should be required to make a decision with respect to the request within thirty calendar days. Failure to respond within this period should be deemed to be a refusal to grant

access, which would enable the requester to pursue appeal remedies under the statute.

7. An extension of the period during which a response is required for an additional thirty days should be permissible
  - a. to obtain a document from an office of that agency which is in a location different from that of the office processing the request;
  - b. to search for or appropriately examine a large number of documents included within the request; or
  - c. to consult with
    - i. another office of that agency which is in a location different from the office processing the request;
    - ii. another agency; or
    - iii. a person having a substantial interest in the document requested.
8. The time periods stipulated in paragraphs 6 and 7 should be reconsidered and reduced once experience in implementing the statutory scheme has been acquired.
9. A governmental institution that proposes to deny a request for access to a document shall advise the requester of the following matters:
  - a. the statutory provision under which access is refused;
  - b. an explanation of the basis for the conclusion that the information sought is covered by the exempting provision;
  - c. the availability of further review and how it can be pursued; and
  - d. the name and office of the person responsible for making the decision.
10. Governmental institutions should be permitted to require requesters to bear reasonable standard charges for the direct costs of searching for and copying requested documents. In the case of information stored in computerized information systems, requesters may be required to pay hourly charges for

the time of the personnel involved in providing the computer printout as well as any additional direct costs to the institution resulting from the use of the computer system.

11. Governmental institutions should be required to waive fees with respect to the provision of information the disclosure of which can be considered as primarily benefiting the public. Criteria for the exercise of discretion to waive fees should include the following:
  - a. the size of the public to be benefited;
  - b. the significance of the benefit;
  - c. the private interest of the requester which the disclosure may further;
  - d. the usefulness of the material to be released;
  - e. the likelihood that a tangible public good will be realized.
12. As a general rule, requesters should not be required to pay search fees in cases where it is ultimately learned that there are no records corresponding to the request, or where records are found but are determined to be exempt from disclosure by the institution in question, unless the requester has been given prior notice that fees are chargeable even though the request may be unsuccessful.
13. A governmental institution should be permitted to require a deposit from the requester to ensure payment of search and copying fees if the anticipated cost will exceed a prescribed amount, such as \$50.00.
14. If, in the course of searching for a document, it becomes apparent that the requester may be assessable for substantial fees, the governmental institution should advise the requester before proceeding further so as to ensure that the cost will be acceptable to him.
15. All matters relating to fees should be subject to review by the Director of Fair Information Practices.
16. Governmental institutions should provide, on request, a written statement indicating the method by which fees have been assessed.

## CHAPTER 13 NOTES

- 1      Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979), Chapters 7, 8, 9, 10 and 11.
- 2      For a detailed discussion, see House Committee on Government Operations, H. Rept. 92-1419, 92 Cong., 2d Sess. (1972); "Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations" (1971), 23 Admin. L. Rev. 217.
- 3      Freedom of Information Act, 5 U.S.C. 552(a)(3).
- 4      Freedom of Information Act, S.N.S. 1977, c. 10, s. 9.
- 5      Ibid., s. 10.
- 6      Bill C-15, 31st Parliament, 28 Elizabeth II, 1979, s. 6.
- 7      Freedom of Information Bill, 1978, c. 13(1).
- 8      The 1967 Freedom of Information Act provided that a person must make a request for "identifiable records." As a result of criticisms of the implementation of this requirement, the act was amended in 1974 to stipulate that a person must make a request which "reasonably describes such records." The 1975 Attorney General's Memorandum interpreted the amended provision in the following terms: "A 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." See United States Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Washington: USGPO, 1975).
- 9      S. 10(2).
- 10     S. 13(4), (5).
- 11     S.N.B. 1978, c. R-10.3, s. 3(3).
- 12     Ibid., s. 3(4).
- 13     S. 14.

- 14 H.R. 92-1419, at 10, reprinted in U.S. Senate and U.S. House of Representatives, "1975 Source Book on Freedom of Information," Legislative History of FOIA and Amendments of 1974 (Washington: USGPO, 1975), hereafter cited as 1975 FOIA Source Book.
- 15 Canadian Bar Association, Model Bill, s. 7(2).
- 16 See, for example, U.S. Freedom of Information Act, 5 U.S.C. 552(b)(6)(A); S.N.B. 1978, c. R-10.3, s. 5(1); S.N.S. 1977, c. 10, s. 11.
- 17 See Chapter 14.
- 18 H. Rept. No. 92-1419, 92 Cong., 2d Sess., 10.
- 19 5 U.S.C. 552(a)(4)(A). See also s. 552(a)(3)(B), requiring publication of rules, "if any," relating to fees.
- 20 These criteria were set forth in the U.S. Attorney General's interpretative memorandum of 1975 (see 1975 FOIA Source Book, 525) and reproduced in part in the Canadian Bar Association's Model Bill, s. 8(3).
- 21 1975 FOIA Source Book, 549.



## CHAPTER 14

# The Exemptions

### A. INTRODUCTION

The underlying premise of a freedom of information law is one of public accessibility of government documents. The critical balance between the public interest in access and the government need for confidentiality is achieved by means of statutory exemptions from the general rule of public access. Although the various freedom of information schemes vary widely in the specifics of their exempting provisions, there is a remarkable similarity in the problems they consider and the purposes they serve. There is overall agreement on the kinds of situations in which the need for confidentiality should override the public interest in publicity. Typically, the statutes provide for partial or total exemption for documents relating to:

1. the deliberative processes of governmental agencies;
2. law enforcement activity;
3. national defence;
4. intergovernmental relations;
5. commercial information;
6. sensitive personal information;
7. information obtained on the basis of a guarantee of confidentiality.

Provisions are also made for interrelating freedom of information laws with confidentiality rules in other statutes.

Despite the relative unanimity of opinion on the categories of exemption, however, existing and proposed statutes differ in the precise details of the drafting of the exemptions. Scholarly writing and public opinion on this aspect are similarly divided. Accordingly, in setting out our own proposals we will draw attention to the important issues arising in the context of each exemption and will indicate our reasons for adopting particular solutions.

As an introduction to our recommended exemptions, it will be helpful to briefly discuss three general considerations: the structure of the exemptions, their permissive nature, and the principle of severability.

#### THE GENERAL STRUCTURE OF THE EXEMPTIONS

Exempting provisions in the various freedom of information schemes we have examined are designed in two different ways. The first is found in much of the U.S. freedom of information legislation: certain types of information or documents are identified and are stated to be exempt from the general principle of access. Although many U.S. provisions do not follow this model, for convenience we will call this approach the "American style." The second approach expresses the exemption in terms of the interest to be protected by non-disclosure. This method has been followed in the bills proposed by the federal governments of Australia and Canada, in the model bills drafted by the Canadian Bar Association, and in the Minority Report of the Royal Commission on Australian Government Administration. We will call this the "purposive style."

An illustration of these different methods of expression will illuminate the distinction between them. The U.S. federal freedom of information law exempts government documents containing commercial information by defining them as:

Trade secrets and commercial or financial information obtained from a person and privileged or confidential[1].

An equivalent provision in the proposed federal Canadian legislation, Bill C-15, is expressed, in part, in the following terms:

The head of a government institution may refuse to disclose a record requested under this Act where the record contains financial, commercial, scientific or technical information

- (a) the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the government institution, where the information was supplied to a government institution on the basis that the information be kept confidential and where it is in the public interest that information of that type continue to be supplied to the government institution;

- (b) the disclosure of which could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with contractual or other negotiations, of a person, group of persons, organization or government institution;...[2]

Unlike the U.S. provision, the Canadian version articulates the interests to be protected by non-disclosure. Information is exempt if disclosure will imperil future information collection by governmental institutions or will cause significant prejudice to the competitive position of the commercial party involved.

In our view, the American style, while concise, results in provisions whose meaning is too uncertain. If an American-style provision is to be precise enough to afford guidance to government officials and to citizens, a very lengthy and detailed description of the kinds of information exempted would be required. (The Swedish freedom of information laws are drafted in this way. Each of the many exemptions in that statute is drafted in very precise language, so that the total effect is one of providing extensive rights of public access to government documents.)

The potential range of exemptions expressed in the more general terms of the U.S. act has been restricted by judicial interpretation. In many instances, the cumulative effect of this interpretation has been to articulate rules of law which indicate the interest in or purpose of non-disclosure that must be present before the exemption will apply. Indeed, the more elaborate provisions stated in the purposive style of the Australian and Canadian schemes are, in large measure, explicit statements of the rules that have been developed by the U.S. courts. (This is the case, for example, with the Canadian provision excerpted above relating to commercial information.) In our view, the purposive style indicates more clearly how the exemption is to be applied, and enables both the government and the public to act with greater confidence and certainty in exercising their rights under the statute. In fashioning our own recommendations, we have, for the most part, adopted the purposive style.

#### THE PERMISSIVE NATURE OF THE EXEMPTIONS

Exemptions may be either permissive or mandatory. Permissive exemptions allow the government to withhold information, but do not require it to do so. Mandatory exemptions require information to be withheld in all cases. As a general rule, we favour the adoption of permissive exemptions in our scheme. In designing exemptions from the general principle of public access, it is inevitable that many documents which could, without harm, be

disclosed to the public, will be covered by the exemption. The adoption of mandatory provisions in a freedom of information law would have the perverse effect of imposing a duty on the government to refrain from disclosing such material. The effect of a permissive exemption is to stipulate that the public cannot force the government to disclose, as a matter of routine, documents in the exempt category. On the other hand, governmental institutions are permitted to disclose particular documents falling within the category if they wish to do so.

However, we do propose two exceptions to this general principle of adopting permissive exemptions. These are the exemptions relating to documents containing personal information concerning identifiable individuals, disclosure of which would constitute an unwarranted invasion of their privacy, and the exemption concerning trade secrets held by governmental institutions. As will be indicated in subsequent chapters of this report, it is our view that disclosure of exempt documents containing sensitive personal information should be precluded by the legislation in order to ensure that the personal privacy of individuals is not violated.

#### THE PRINCIPLE OF SEVERABILITY

Many freedom of information schemes require that governmental institutions must, in response to a request for a document that contains information in an exempt category, make reasonable efforts to sever the non-exempt material and make it available to the requester. We have already indicated that we are in general agreement with this proposition, and we have suggested the adoption of a provision to this effect. Thus, although the following discussion makes frequent reference to exempt documents, there may be many situations in which severable portions of an exempt document would be made available in response to a request for access. The duty to sever or segregate non-exempt material is expressed in terms of a requirement to make "reasonable efforts." Where severance is impracticable, no duty to sever will arise.

Against this background, then, we now turn to a consideration of the various exemptions we propose for adoption as part of a provincial freedom of information law. In subsequent sections of this chapter, we will make specific recommendations with respect to exemptions concerning:

- Cabinet documents
- advice and recommendations

- law enforcement
- national defence and international relations
- information received in confidence from another government
- confidentiality preserved by other statutes
- commercial information
- disclosures creating unfair advantage or effecting harm to negotiations or testing procedures
- personal privacy
- legal opinions

We do not recommend adopting exemptions that make explicit reference to national security, federal-provincial relations, or breach of confidence. Although there are types of information in each of these categories which must, we believe, be exempt, we are concerned that the mere reference in an exemption to all documents "relating to," for example, "federal-provincial relations," would cast too wide a veil of secrecy with respect to the governmental activity in question. Accordingly, we have attempted to identify more precisely the interests in confidentiality relating to such matters and to ensure that those interests are protected under our proposed exemptions.

#### NATIONAL SECURITY

Although "national security" is a term which has gained some currency in public discussions relating to such matters as espionage, domestic subversion, and more generally the prevention of threats to the stability of the government, the term is not used in Canadian statutes to refer to matters of this kind[3]. Thus, although a number of criminal offences which might be said to relate to matters of security are to be found in the federal Canadian Criminal Code and the Canadian Official Secrets Act, those statutes do not use the term "national security" to indicate the nature of the proscribed conduct[4]. The absence of a precise legal definition of "national security" suggests that it would be a difficult and potentially very broad standard to apply in the freedom of information context. For this reason, the federal Canadian Joint Committee on Regulations and Other Statutory Instruments recommended in its 1978 report on freedom of information that use of the term be avoided in drafting a federal

freedom of information law[5]. Further, the proposed Canadian federal legislation made no reference to the term, preferring to deal with security-related matters in the exemption relating to international relations and defence[6]. Apart from the foregoing considerations, there is a further reason for avoiding usage of the expression in the context of a provincial freedom of information scheme. "National security" is not an apt phrase for security-related matters at the provincial level, and referring to "provincial security" does not appear to be an illuminating alternative.

Nonetheless, it is clear that there are a number of "security" matters which must be embraced by our proposed exemptions. It is our view that matters of this kind are adequately protected by the exemptions relating to:

- law enforcement information
- international relations and defence
- information received in confidence from another government

As will be seen, the exemption relating to law enforcement activity provides protection for investigative and intelligence files maintained by law enforcement authorities, and protects information which would, if disclosed, aid in the commission of criminal offences. Most information that could be said to relate to security matters will be covered by these provisions. Thus, information relating to the investigation of criminal offences, including offences relating to national security, will be exempted. Further, the exemption for intelligence information would protect information gathered in the course of attempting to prevent breaches of security. The exemption for information useful in the commission of an offence will adequately protect information concerning precautions taken for the security of governmental institutions and public officials. To the extent that there are security-related matters which do not consist of law enforcement information, broadly construed, they would be covered by the national defence and international relations exemption. Further, information received from the federal government relating to security matters would, if not covered by these other exemptions, be protected by the exemption for information received in confidence from another government.

## FEDERAL-PROVINCIAL RELATIONS

For similar reasons, we feel that it would not be desirable to include an exemption in our proposed scheme for information relating to federal-provincial relations. Although we believe that certain kinds of information concerning Ontario's involvement in federal-provincial policy-making activities requires protection, a broad exemption relating to federal-provincial relations would, we believe, withhold many kinds of information which should be made available to the public. The collaborative efforts of federal and provincial government extend across a wide range of governmental programs and activities. It would be most unsatisfactory, from a freedom of information perspective, to exempt documents containing essentially factual material about the operation of provincial government programs that have some connection, financial or otherwise, with the federal government or any other provincial government.

It is our view that any sensitive information related to federal-provincial relations will be exempt from the general rule of access by virtue of the following exemptions:

- Cabinet documents
- advice and recommendations
- national defence and international relations
- information received in confidence from another government
- disclosures relating to negotiations

Perhaps the most sensitive information relating to federal-provincial relations consists of advice given to Cabinet by public servants with respect to initiatives to be taken by the provincial government. Documents of this kind would be exempt either as Cabinet documents or as advice and recommendations. The disclosure of proposed negotiating strategies is also undesirable. This, however, is a more general problem arising in the context of government negotiations with any third party and is the subject of an exemption relating to negotiations. Finally, satisfactory relationships with other governments might be inhibited if the provincial government were not able to give binding undertakings that it would treat information received from another government as confidential. This difficulty arises not only in federal-provincial relationships, of course, but in dealings with governments of foreign jurisdictions as well. Accordingly, this question is also addressed in a separate exemption in our proposal.

## BREACH OF CONFIDENCE

Information is often provided to the government by third parties on the basis of an understanding, express or implied, that the information will be treated in confidence. Should a generalized exemption relating to "information received in confidence" or information which, if disclosed, would constitute a "breach of confidence" be included in the act? Provisions to this effect are not included in the U.S. freedom of information laws, nor in the federal Canadian bill. However, there have been suggestions elsewhere to the effect that such a provision might be suitable[7].

We have concluded that the adoption of a broad exempting provision of this kind would not be desirable. The need of governmental institutions to protect confidences is one which we recognize and for which we make adequate provision in our exemptions. However, we believe that the treatment to be accorded such confidences varies slightly from context to context; we have included the protection of confidences in the exemptions relating to each possible source of information. Thus, a broad exemption of this kind is provided with respect to information received in confidence from another government. A more restricted discretion to grant such confidences is set forth with respect to the supply of information by corporations and other business concerns. The treatment of confidences relating to personal information varies from the law enforcement context (in which confidential sources are closely guarded) to the more general and flexible treatment given in the exemption for personal information the disclosure of which would constitute an unwarranted invasion of personal privacy.

Against this background, then, we now turn to a discussion of the specific exemptions we propose for adoption in a provincial freedom of information law.

### B. CABINET DOCUMENTS

As we have indicated in previous chapters of this report, the deliberations and decision-making processes of the Ontario Cabinet have traditionally been shielded from public view, as they have been in all other parliamentary jurisdictions. There are a number of reasons for accommodating this tradition in a freedom of information law by expressly exempting certain kinds of Cabinet materials from the general right of public access. First, the routine disclosure of Cabinet deliberative materials would bring an abrupt and, in our view, undesirable end to the tradition of collective ministerial responsibility. In Chapter 5 of this report, we expressed our conviction that the notion of collective

ministerial responsibility retains a contemporary relevance. The requirement that each member of the Cabinet assume personal responsibility for government policy ensures that all members of the government of the day can be held accountable to the public, and encourages frank and vigorous exchanges of views in Cabinet discussions. The tradition of confidentiality of Cabinet discussions can also be supported on the basis that it permits public officials to provide the Cabinet with candid advice. Further, there is an evident public interest in ensuring that the decision-making processes of the Cabinet can be conducted as expeditiously as is possible.

If it is obvious that the confidentiality of Cabinet deliberations must be preserved in a freedom of information scheme, it is less obvious how an exemption relating to this matter should be drafted. In particular, there is some uncertainty in the concept of "Cabinet documents." If this phrase includes not only those documents that are physically within the possession of Cabinet officials, but also documents that are prepared for eventual submission to Cabinet, the notion of "Cabinet documents" would extend far beyond the Cabinet decision-making processes into the files of the various ministries and other governmental institutions of the province of Ontario. Clearly, a more restricted definition of this concept would be appropriate for our purposes.

In designing a freedom of information act exemption pertaining to Cabinet decision-making processes, it is useful to assume, for definitional purposes, that Cabinet documents consist only of those documents that have been either generated by or received by Cabinet members and officials in the course of their participation in the decision-making processes. Thus described, Cabinet documents would include agendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions[8].

The disclosure of many of these documents would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members. For the reasons suggested above, all such material should be considered exempt under a freedom of information scheme. Some observers have suggested, however, that two kinds of documents -- decisions of Cabinet and background memoranda containing essentially factual material -- could be routinely disclosed without undermining the confidentiality of Cabinet discussions.

With respect to Cabinet decisions, it is argued that once a decision has been made, the immediate availability of the record of the decision would be in the public interest. The Australian Minority Report Bill would require the Prime Minister to "cause a register to be kept and made available for inspection and copying by members of the public containing details of all decisions made by the Cabinet." We are not persuaded of the wisdom of this proposal. There may be many situations in which the Cabinet might properly wish to delay public announcement of its decisions. It may have entered into arrangements with other governments or with affected individuals to postpone announcement until a specific time or until the occurrence of a particular event. The Cabinet may develop plans for dealing with emergencies or other contingencies, the effectiveness of which might be diminished by public announcements. Further, it is a feature of the parliamentary tradition, and a frequent practice of the government of Ontario, to make important announcements of policy decisions in the Legislative Assembly. We see no merit in reducing the importance of the legislature as a forum for announcements of this kind. Although it might be possible to draft exemptions to the general rule proposed in the Minority Report Bill to accommodate circumstances of the kind we have mentioned, we do not believe that the public interest in open government would be significantly advanced by adopting a scheme of this kind.

A more persuasive argument can be made for making available what might be referred to as background materials containing essentially factual information submitted to Cabinet. As will be seen, it is our view that documents containing factual material should generally be accessible to the public under our freedom of information proposals. Thus, material such as statistical studies and staff reports in the possession of ministry (as opposed to Cabinet) officials would routinely be made available under the scheme we propose. This is a common feature of proposed and existing freedom of information legislation in other jurisdictions. The question which then arises is whether such material should become exempt from access merely because it has passed into the hands of a Cabinet official (for example, where a statistical report has been attached to a Cabinet submission recommending action with respect to the same matter to which the statistical information pertains). The federal Australian bill provides for the availability of such material by stipulating that the general exemption for Cabinet documents does not apply to a document simply by virtue of the fact that it has been submitted to the Cabinet for consideration "if it was not brought into existence for the purpose of submission for consideration by the Cabinet"[9].

Although it is our view that documents of this kind should be made available to the public in response to requests directed to ministries, we do not think it would be wise to require disclosure of such materials from Cabinet officials at a time prior to Cabinet deliberations based upon them. The effect of routinely making available to the public information concerning the nature of material forwarded to Cabinet may be to create an undesirable pressure on the Cabinet to publicly respond quickly to inquiries concerning such material even though it may have not yet arisen for consideration by Cabinet members. In this way, the ability of Cabinet to allocate its decision-making resources in accord with its own determinations of the relative importance of matters on its agenda could be significantly impaired.

Once a decision has been made by Cabinet with respect to a particular matter, however, this reason for withholding disclosure loses its force. Bill C-15, the federal Canadian proposal, included in its exemption for Cabinet documents a sub-paragraph exempting "records containing background information, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for consideration by Council for making decisions, before such decisions are made"[10]. We believe that a provision of this kind would provide a desirable limitation on the general principle that documents pertaining to Cabinet deliberations should be exempt from the freedom of information scheme. Adoption of this measure would represent an extension of the current practice of the Ontario government of tabling compendiums of background information with the introduction of bills[11] to Cabinet decisions more generally.

#### RECOMMENDATIONS

1. We recommend that the proposed freedom of information law contain an exemption for documents whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:
  - a. agenda, minutes or other records of the deliberations or decisions of Cabinet or its committees;
  - b. records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet minister to Cabinet;
  - c. records containing background explanations, analyses of problems or policy options submitted or prepared for

- submission by a Cabinet minister to Cabinet for consideration by Cabinet in making decisions, before such decisions are made;
- d. records used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
  - e. records containing briefings to Cabinet ministers in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;
  - f. draft legislation.

#### C. ADVICE AND RECOMMENDATIONS

The need for confidentiality pertaining to various aspects of decision-making processes is not restricted to decisions at the Cabinet level. An absolute rule permitting public access to all documents relating to policy formulation and decision-making processes in the various ministries and other institutions of the government would impair the ability of public institutions to discharge their responsibilities in a manner consistent with the public interest. On the other hand, were a freedom of information law to exempt from public access all such materials, it is obvious that the basic objectives of the freedom of information scheme would remain largely unaccomplished. There are very few records maintained by governmental institutions that cannot be said to pertain in some way to a policy formulation or decision-making process.

Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must

be accessible to the public. We are in general agreement with both of these propositions.

The area of contention surrounds the question of whether all documents containing advice and recommendations must be exempt from the general rule of public access and, if not, in what circumstances these documents should be available for public scrutiny. Before assessing the desirability of possible incursions on the general principle that such documents should be exempt, it will be useful to briefly review the kinds of arguments made in support of an exemption for documents containing advice as well as those in support of greater openness.

The primary concern relating to public disclosure of documents containing advice and recommendations is that such documents would be written with less candour than is currently the case. It is suggested that public servants may feel a greater reluctance to express critical views or to put forward proposals that might ultimately be considered contentious, and that these effects would diminish the quality of policy-making and decision-making activities within government. Second, there is some concern that access to such materials would substantially increase public discussion of the personal views of public servants, and that a loss of anonymity and perceived neutrality would result. To the extent that public servants became the focus for public discussion of policy matters, the role of ministers would thereby be diminished. There is also some concern that the accessibility of these documents might lead to a greater use of oral communication. Since the spirit of the requirement of openness could be so easily violated, it is argued, there is little point in attempting to impose it in the first place. Finally, some have suggested that the disclosure of materials that, on occasion, may be prepared in considerable haste might create unfair impressions of the abilities of the authors. Some of these fears are, we believe, exaggerated.

Those who argue in favour of a greater measure of openness with respect to deliberative materials suggest that the prospect of publicity might lead to an improvement in the quality of such documents. Greater openness would also facilitate careful scrutiny by knowledgeable outsiders of the merits of proposals being considered by the government. More informed decisions would be made, it is argued, and interested parties would feel that they had been afforded an opportunity to make a contribution to the formulation of policies concerning them.

For obvious reasons, it is difficult to weigh accurately the force of these arguments and predict with confidence the precise results of greater openness with respect to the deliberative

decision-making processes of government. Certainly, the dire consequences predicted by those who fear that the granting of access to deliberative documents would substantially disrupt decision-making processes do not appear to be borne out by the experience of the United States under the equivalent exemption of the Freedom of Information Act. Although the (b)(5) exemption relating to "inter-agency or intra-agency" memoranda has been interpreted to exempt materials containing recommendations and advice, it is the practice of the Department of Justice to encourage disclosure of such materials unless some clear prejudice to the decision-making process is demonstrated by the agency. The department does not accept general claims that disclosure will tend to reduce the candour of internal communications as sufficient prejudice to warrant a withholding of the document. To be sure, there are important structural differences between the congressional and parliamentary systems of government which suggest that U.S. experience is not immediately translatable into predictions of the adoption of similar measures in Ontario. Nonetheless, to the extent that concerns about greater openness in decision-making processes are based on a somewhat pessimistic assessment of the ability of public servants to discharge their responsibilities effectively in the context of a more open environment, the U.S. experience does not seem to support this view.

The relationship between ministers and public servants raises more problematic considerations. Although it is clear that the constitutional convention of ministerial responsibility in which the terms of this relationship are traditionally expressed is in a state of gradual evolution[12], we do not feel that it would be appropriate to radically change the confidentiality of the relationship between ministers and public servants. The U.S. experience, it should be noted, represents the culmination of a rather lengthy period of experimentation with the application of the act to deliberative materials. It may be that a similar evolution in practice could occur in Ontario with beneficial consequences. We note that the federal Australian bill appears to accommodate, if not encourage, experimentation of this kind with respect to the disclosure of documents containing advice and recommendations. The bill provides that such documents are exempt from the act only if disclosure "would be contrary to the public interest"[13]. The bill further proposes that the question of whether the disclosure would be in the public interest should reside with the minister in question, although the issue as to whether or not the document does in fact contain advice or recommendations would be subject to independent review by the Administrative Appeals Tribunal. The Australian Senate Committee on Constitutional and Legal Affairs recommended against ministerial discretion in this matter and felt that the "public interest"

in disclosure should also be the subject of independent review by the tribunal. The committee felt that independent review would best allow the applicable standard of the "public interest" to develop in a way consistent with the changing nature of the relationship between government and the community[14].

Our own view is that any process of experimentation or evolution of this kind would be better conducted in the absence of independent and binding determinations by outside reviewing agencies. It is not possible to describe with certainty the practical consequences of greater openness in these matters in a parliamentary jurisdiction. If there is to be an alteration in the significance of the role played by public servants, we feel that change should be undertaken at the direction of the ministers of the Crown. Accordingly, it is our view that, subject to certain exceptional circumstances to be outlined below, documents containing advice and recommendations should be the subject of an exemption from the proposed freedom of information law.

Our review of the exemptions pertaining to policy advice that have been adopted or proposed in other jurisdictions suggests that the following additional questions should be addressed:

- Should the exemption apply only to the advice and recommendations of public servants?
- Should the exemption apply to documents or portions of documents that contain an analysis of factual material or an evaluation of policy choices?
- Should the exemption apply to the technical opinions of experts?
- Should the exemption apply to documents that provide explanations of decisions which have already been made?
- Should the exemption apply to deliberative materials that have been referred to publicly by the government as the basis for a particular decision?
- Should the exemption apply to material used by an institution as part of its "internal law"?

We will consider each of these issues in turn.

It is evident that the major focus of the concerns we have articulated with respect to disclosure of deliberative materials relates to policy advice rendered by public servants. Indeed, the federal Canadian proposals limit the exemption concerning "advice

or recommendations" to materials of this kind developed "by a government institution or a Minister of the Crown"[15]. The equivalent U.S. exemption, however, has been interpreted to apply as well to the advice and recommendations of consultants retained by the government. Severable portions of consultants' reports that do not contain advice or recommendations are available, however. On balance, we are persuaded that the U.S. approach to this problem is a more satisfactory one. By treating consultants' advice in the same way as advice given by public servants, any disincentive to seek the advice of experts in fields related to a proposed policy initiative is removed. Further, in many situations the dividing line between full-time policy advisors and part-time retained consultants may be, in functional terms, very difficult to draw. We recommend that as a general rule, documents containing the advice or recommendations of public servants or consultants retained by governmental institutions be exempt from access.

A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind[16].

Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional "opinions" and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government. If the phrase "advice and recommendations" is interpreted in the light of the underlying purpose of the exemption, we would anticipate that satisfactory determinations of the appropriate reach of the exemption could be made. We do not think it would add much to the clarity of the provision to add a

limitation that it would not apply to "technical advice and the opinions of experts" or some similar phrase.

Three further useful points of clarification emerge from the jurisprudence interpreting the equivalent exemption in the U.S. act. First, U.S. courts have determined that the exemption does not apply to documents whose purpose is to provide an explanation or interpretation of a decision previously made. The act has been said to not apply to "post-decisional" documents. Second, U.S. courts have decided that the exemption would not apply to a document expressly described by an agency as containing the reasons for or justifications for a decision. Finally, the courts have decided that the exemption does not extend to materials containing advice and recommendations that have acquired the status of "internal law" within the agency (in the sense that the document is used by agency personnel as a guideline or precedent in the making of determinations affecting individuals).

It is our view that the reasons underlying the exemption relating to deliberative materials do not extend to documents falling within these three categories. The intent of the scheme is to prevent disclosure of policy options that have been rejected, not of those that have been adopted and form the basis of a government decision. The disclosure of material relating to "internal law" would ensure that affected individuals had an opportunity to become aware of the criteria used in decision making[17].

#### RECOMMENDATIONS

1. We recommend that the freedom of information law include an exemption for documents containing advice or recommendations of public servants and consultants retained by a governmental institution, provided that the exemption should not be construed to include documents of the following kinds:
  - a. an explanation or interpretation of a decision previously made by a governmental institution;
  - b. a document that has been expressly referred to by the institution as containing the reasons for or justification of a decision made by the institution;
  - c. "internal law," as defined in our proposals in Chapter 12.

#### D. LAW ENFORCEMENT

The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality. Neither is it surprising that none of these schemes simply exempts all information relating to law enforcement. The broad rationale of public accountability underlying freedom of information schemes also requires some degree of openness with respect to the conduct of law enforcement activity. Indeed, if law enforcement is construed broadly to include the enforcement of the many regulatory schemes administered by the provincial government, an exemption of all information pertaining to law enforcement from the general right to access would severely undermine the fundamental objectives of a freedom of information law.

Access to law enforcement information is also a matter of interest to those who are, or who fear they may be, the subject of record-keeping activity by law enforcement personnel. In addition to investigative records relating to individuals who have engaged in criminal activity, or are suspected of having done so, information concerning witnesses, informants, relatives or associates of suspected parties or victims will also be recorded. Records quite unrelated to the investigation of offences will also be kept, as in the case of security clearances of government personnel. The interest of such individuals in obtaining access to law enforcement files is an aspect of the informational privacy problem which will be the subject of discussion in subsequent sections of this report; a discussion of the general question of granting access to government files containing personal information as a means of affording protection to individual privacy will not be undertaken here. As will be seen, however, we feel that the law enforcement exemption to the freedom of information scheme should be paralleled by a similar exemption from the general rule that persons about whom personal information is recorded by government should be afforded an opportunity to see their files.

Although the precise formulation of freedom of information act exemptions for law enforcement information has proved to be a controversial matter, the nature of the problem is well understood. Interviews with law enforcement personnel conducted by our research staff indicate concerns similar to those manifested in typical exemptions for law enforcement information. Interviewees stressed the need to protect confidential informants and to ensure the continued flow of information from other law enforcement agencies. Concerns were expressed to the effect that disclosure

of law enforcement techniques would reduce their effectiveness. Risks of possible retaliation by offenders against informants and law enforcement personnel were also mentioned.

The U.S. Freedom of Information Act exempts law enforcement information in the (b)(7) exemption in the following terms:

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;...

Many of these subparagraphs respond to the concerns expressed by Ontario law enforcement personnel. Additionally, the (b)(7) exemption attempts to protect ongoing investigations and proceedings from disclosure: public access to investigative files would do much to frustrate the conduct of investigations, and premature disclosures prior to trial would impair the ability of the prosecution to effectively present its case. Disclosure of the identity of witnesses before trial, for example, might create a risk of coercion or intimidation aimed at discouraging the witness from testifying. The prospects of the accused for a fair trial could also be impaired if prejudicial publicity concerning the case against the accused prior to the trial were facilitated by freedom of information requests. We believe that all the features of the U.S. exemption are necessary and should be included in an Ontario scheme.

The exemption can be improved in a number of respects, however. In making recommendations to this effect, we have drawn assistance from useful discussions of these problems put forward in the Minority Report of the Australian Royal Commission on Government Administration[18], the provisions of the Minority Report Bill and corresponding provisions of the Canadian Bar Association Model Bill[19], the federal Australian proposals[20], and the recent report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission)[21].

In general terms, our recommendations are intended to clarify the manner in which the exemption applies to certain kinds of law enforcement information; extend the application of the exemption to information generated in the course of intelligence-gathering activity; and establish mechanisms pursuant to which law enforcement agencies may refuse to disclose the existence of an investigative or intelligence record.

We appreciate that proposals having the general effect of extending the scope of the law enforcement exemption will not be viewed favourably by those who advocate direct access to law enforcement files as a means of protecting the privacy of individuals mentioned in those files. There are two considerations, however, which persuade us that the opening up of such files should be approached with some caution. First, the effect of erring on the side of too much disclosure in law enforcement matters may have very severe consequences for affected individuals. Inadvertent disclosure of the identity of informants, for example, could not only prove embarrassing but may place their lives or safety in peril. Second, as will be seen more clearly in the context of our privacy protection proposals, we believe that there are mechanisms other than direct file access which can effectively meet privacy protection objectives in the context of sensitive law enforcement information. It is our view that the Director of Fair Information Practices should be granted access to exempt law enforcement information in order to seek resolution of complaints made by individuals who believe they have been prejudiced by the presence of inaccurate information in exempt materials. An illustration may be helpful. If an individual has been denied a security clearance on the basis of information that is exempt from access, upon complaint to the director an investigation could be undertaken for the purpose of attempting to ensure that the individual has been fairly treated. Further, the director would be empowered to comment generally on information-gathering practices in the exercise of his investigative and advisory functions.

We now turn to a consideration of modifications to be made to the U.S. law enforcement exemption.

#### CIVIL AND REGULATORY MATTERS

First, some clarification of the application of the exemption to civil or regulatory matters is required. We believe that it is not desirable to treat information gathered for regulatory enforcement purposes differently from information gathered for criminal law enforcement. The need for confidentiality of regulatory enforcement activities is similar (if not identical) to that

of criminal law enforcement activities. Further, there would be some difficulty in drawing clear distinctions between criminal and non-criminal matters. The investigation of one particular incident, such as a securities fraud, may have both criminal and regulatory dimensions. It may not be clear in the initial stages of such an investigation whether one or both aspects of the matter will be pursued by the law enforcement authorities. For these reasons, law enforcement exemptions in various freedom of information schemes include civil and regulatory matters within their scope.

However, if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.

Under the U.S. act, it has been accepted that routine material of this kind not gathered for the purpose of investigating a particular offence is not exempt from the general rule of access merely because it relates to the enforcement of law. A provision in the Australian Minority Report Bill clarifies this point by excluding routine compliance inspection from the scope of the exemption. The bill specifies that the following information must be disclosed:

A report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law[22].

We recommend the adoption of a provision to this effect.

Second, we think it would be useful to clearly stipulate that information gathered in order to assess the effectiveness of law enforcement programs would not be covered by the exemption. Again, the Minority Report Bill accomplishes this objective by specifically requiring disclosure of:

a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis[23].

## **INTERFERENCE WITH "PROCEEDINGS"**

The third point of modification relates to the exemption of investigatory information that will, in the words of section (b)(7)(A) of the U.S. act, "interfere with enforcement proceedings." Subsequent interpretations of this provision have indicated that its intent is to exempt only those files that are, in some sense, in current use. Thus, investigatory information would be available once there is no longer a prospect of enforcement proceedings, provided that the information in question is not covered by one of the other features of the (b)(7) exemption. The Australian Minority Report Bill expresses this intent by stating that such material will be exempt only if it would "interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding could be reasonably expected to eventuate"[24]. The effect of this provision is that investigatory files which are no longer of interest to law enforcement authorities (because, for instance, they are satisfied that the individual has not committed an offence) would not be exempt from access unless the material was for some other reason covered by the exemption. Although we recommend that this clarification be adopted, we further recommend that intelligence files be exempt from access where disclosure would frustrate the purpose of the intelligence-gathering activity. For example, an investigatory file that has been closed (that is, any thought of taking proceedings against the individual under investigation has been abandoned) might nonetheless be exempt from access if the information in the file is preserved by the law enforcement authorities as criminal intelligence information. We now turn to a consideration of the need for an exemption relating to intelligence files.

## **INTELLIGENCE INFORMATION**

Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offences. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities. Similarly, information on patterns of conduct unrelated to the commission of a specific

offence is gathered in the course of intelligence work undertaken for the purpose of granting or denying security clearances to government personnel. It is evident that law enforcement activity of this kind is necessary, and, moreover, that it cannot be conducted effectively if intelligence files are to be made available to the public or to the subjects of such investigations under a freedom of information law.

#### CONFIDENTIAL SOURCES

An exemption must also be designed for information supplied by informants whose identity must not be revealed. Under the U.S. act, both the identity of a confidential source and any information furnished only by that source are exempt from access in the context of criminal law enforcement. With respect to civil and regulatory matters, however, only the identity of the source is shielded by the exemption. For reasons considered above, the validity of drawing a distinction between criminal law enforcement information and civil and regulatory enforcement information is not apparent to the Commission. Accordingly, we propose that a revised exemption relating to confidential sources be applicable to both kinds of information. The Australian materials point in two directions on this issue. The Minority Report Bill suggests that both the identity of the source and information supplied exclusively by the source should be exempt. The federal Australian bill, however, suggests that with respect to all matters, information is exempt only if it would "disclose, or enable a person to ascertain, the identity of a confidential source" [25]. The effect of the narrower provision in the federal bill is to require that in the event of a request, an attempt must be made to determine whether the particular information disclosed by the source would have the effect of enabling the requester to identify the source. We are not convinced that it would be a sound policy to require judgments of this kind to be made with respect to information supplied on a confidential basis. The judgment required would be a very delicate one in many situations. It may be difficult to determine whether the disclosure of a particular item of information could be pieced together with other information available to the requester so as to enable an identification to be made. We also believe that it is important to facilitate the supply of confidential information for law enforcement purposes; to this end, law enforcement authorities have expressed the view that it is essential that they be able to give assurances to such sources that their confidences will be respected. Accordingly, we favour the extension of the broader exemption relating both to identity and to information supplied exclusively by the source to all law enforcement information, whether criminal, civil or regulatory in nature. This is not to say, of course, that individuals

who may be prejudicially affected by this information will not have other means of becoming aware of the substance of allegations made. In the case of criminal prosecutions, the accused will be made aware of the evidence led against him at trial. With respect to civil or regulatory matters, the affected individual is entitled under present law to be made aware of the substance of allegations made against him, and will also become aware of evidence led in adjudicative proceedings. Here too the role of the Director of Fair Information Practices may provide assistance to individuals who are denied direct access to their files but who seek the intervention of an independent third party to ensure that they have been fairly treated.

#### **INVESTIGATIVE TECHNIQUES**

Although there is general agreement on the need for an exemption for law enforcement investigative techniques and procedures, two points are commonly raised with respect to this exemption. First, the accepted interpretation of the exemption dealing with this question in the U.S. act is that it does not exclude access to information about investigative techniques such as wiretapping or fineepppiltile, the use of which is commonly known and understood by the general public. This interpretation is consistent with the underlying philosophy of the exemption that the only reason for non-disclosure of information concerning investigative techniques is to ensure that the effectiveness of such techniques will not be prejudiced. This limitation on the exemption has been expressed in the federal Australian bill in the following terms:

A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to:...

- d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures...[26].

A similar clarification should be included in the Ontario provisions.

A second limitation often proposed relates to the disclosure of illegal law enforcement techniques and procedures. The Minority Report Bill and the executive branch interpretation of the U.S. act support this approach by exempting only information revealing the use of legal law enforcement techniques and procedures[27]. Although the federal Australian bill does not adopt

this approach, the Senate Standing Committee on Constitutional and Legal Affairs recommended that this limitation on the enforcement techniques exemption be added[28]. Bill C-15 appears to exempt in a general way information relating to investigation techniques, but more narrowly exempts plans for specific lawful investigations or "any other information the disclosure of which would be injurious to...the conduct of lawful investigations"[29]. While we appreciate the reasons underlying suggestions of this kind, we are not persuaded that a limitation relating to the legality of investigative techniques is appropriate in a freedom of information exemption. The effect of including this limitation would be to require that the legality of particular techniques (a question which may be one of some difficulty in particular instances) be resolved in the context of a freedom of information act request. A more satisfactory means of dealing with perceived illegalities would be to refer such matters to the Attorney General of Ontario for further investigation.

#### **INFORMATION USEFUL IN THE COMMISSION OF CRIMES**

Explicit reference should be made to the question of exempting from access information that might be useful in the commission of criminal offences. For obvious reasons, law enforcement authorities should not be required to reveal security arrangements relative to the protection of persons or property; nor should they have to provide, for example, information useful to individuals attempting to escape from lawful custody. Suggested provisions to this effect are set forth in the Minority Report Bill and in the Canadian Bar Association Bill. The McDonald Commission recommends the adoption of a provision exempting information which "might otherwise be helpful in the commission of criminal offences"[30].

#### **DISCLOSURE OF EXISTENCE OF FILES**

Finally, we turn to the question of establishing a mechanism to enable law enforcement authorities to refuse to disclose whether particular kinds of law enforcement information are being kept by the authority. The importance of permitting agencies to refuse to indicate whether or not they are investigating a particular individual was the subject of comment in the First Report of the McDonald Commission. There may arise (albeit rarely) situations in which the mere disclosure of the existence of an investigatory or intelligence file will in itself communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity. The McDonald Commission has recommended that in response to a request for a document which falls into any of the exempt categories, law

enforcement authorities should be permitted to reply that any such document does fall within an exempt category and refuse to disclose the existence or non-existence of such a document. The commission further recommended, however, that an automatic review of the processing of requests in this way be undertaken by an independent administrative tribunal for the purpose of ensuring that, in the tribunal's view, the document properly falls within one of the exempt categories and that the government has properly refused to confirm or deny the existence of the document[31]. We believe that these proposals satisfactorily resolve this question, and we recommend their adoption.

#### PERSONAL PRIVACY

Finally, it may be noted that the law enforcement exemption of the U.S. FOIA specifically exempts material which would, if disclosed, constitute an unwarranted invasion of personal privacy. The effect of this provision is to deny third parties access to sensitive law enforcement information concerning another individual. This is an appropriate provision in light of the fact that law enforcement files do contain much sensitive personal information. However, the exemption of sensitive personal information is a more general problem and, for this reason, a general exempting provision relating to privacy invasion is included in the American act and will be included in our proposals. It is our view, therefore, that it would be redundant to make reference to the privacy protection issue in the context of the law enforcement exemption.

#### RECOMMENDATIONS

1. We recommend that the freedom of information law provide that in replying to a request for a document or documents or their contents which fall into any of the categories hereinafter set out in this paragraph, the government be empowered to reply that the request falls within such categories, and the government refuses to disclose the existence or non-existence of such document or documents. The categories herein referred to are documents which could reasonably be expected to:
  - a. interfere with an enforcement proceeding;
  - b. interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding might be reasonably expected to eventuate;

- c. interfere with the gathering of intelligence information on organizations or individuals;
  - d. reveal investigative techniques and procedures currently in use or likely to be used;
  - e. disclose the identity of a confidential source of information, or disclose information furnished only by that confidential source;
  - f. endanger the life or physical safety of persons engaged in law enforcement activity;
  - g. deprive a person of a fair trial or impartial adjudication;
  - h. endanger the security of a building, or the security of a vehicle carrying items, or of a system or procedure for the protection of items, for which protection is reasonably required;
  - i. facilitate the escape from custody of a person who is under lawful detention or who could otherwise be expected to jeopardize the security of a centre for lawful detention; or
  - j. otherwise be helpful in the commission of criminal or regulatory offences, or tend to restrict the detection of crime.
2. The preceding recommendation should not be construed to include:
- a. a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis;
  - b. a report prepared in the course of routine inspections or investigations by an agency that has the function of enforcing and regulating compliance with a particular law of Ontario.
3. We further recommend that the freedom of information law provide that a refusal by a governmental institution to confirm or deny the existence of a document which falls into the exemption in paragraph 1 above be subject to review by the Director of Fair Information Practices.

## E. INTERNATIONAL RELATIONS AND NATIONAL DEFENCE

Freedom of information laws invariably make some provision for the exemption of information relating to matters of foreign relations and national defence. The reasons for this are perhaps self-evident. As a general rule, freedom of information laws require the disclosure of documents or parts of documents containing factual information. With respect to matters of domestic politics, it is assumed that the right to know should extend, essentially, to factual information relating to the affairs of government. With respect to foreign relations and national defence, however, the disclosure of purely factual information could have undesirable consequences. The need for confidentiality relating to military matters need not be belaboured. With respect to international relations, the disclosure of information and analysis compiled by public officials relating to negotiations with a foreign government or descriptions of the political environment in another country may be viewed as particularly sensitive.

Although it is evident that an exemption for material relating to international relations and national defence must be included in any freedom of information law enacted by a national government, it is less obvious that a similar exemption would be appropriate in the context of a provincial scheme. The conduct of international relations and the protection of national defence are, of course, primarily federal concerns. Accordingly, it is unlikely that extensive information relating to these matters is contained in the files of the provincial government. However, the question is not whether such collections are extensive but whether they exist at all and are therefore in need of protection under the statute. In our view, there is a basis on which the inclusion of such an exemption can be recommended.

With particular reference to international relations, the participation of the government of the province of Ontario in international dealings of various kinds may be more extensive than is generally appreciated. Although the power to enter into treaties with foreign governments resides with the government of Canada, the power to implement treaty obligations with respect to provincial matters resides with provincial governments[32]. When provincial interests in such matters as the environment, energy, education, and cultural and social matters are the subject matter of international negotiations, the government of Canada will often consult extensively with provincial officials. It is not uncommon for provincial public servants to serve as members of a Canadian delegation involved in international negotiations and discussions of this kind. The government of Ontario may also act on its own initiative in such a way as to require direct contact with the representatives of governments of foreign countries and state

level governments in the United States. Ontario, for example, maintains trade offices in various countries for the purpose of promoting commercial activity and industrial development in the province[33]. Further, the government of Ontario, as is the case with other Canadian provincial governments, has a significant number of direct working relationships with U.S. border states. Ontario has entered into agreements with state governments with respect to such matters as commercial vehicle licensing, hydro power interconnection, and air quality control. It is realistic to assume that the range and importance of such contacts with governments of foreign jurisdictions are likely to increase rather than diminish.

There is, then, a range of provincial "diplomatic" activity which may generate information which could properly be the subject of an exemption relating to international relations or the relations of the province of Ontario with the governments of other jurisdictions. Much of the especially sensitive information that might be generated in these activities would, however, be exempt under other provisions. In particular, exemptions pertaining to information received in confidence from another government, and disclosures which would prejudice negotiations of the government of Ontario would extend protection to many potentially sensitive kinds of material. For example, information obtained from the Canadian Department of External Affairs would normally be covered by the former exemption. Documents indicating negotiating strategies or instructions to public officials would be protected by the latter. However, it is possible that information which has not been obtained from another government and which is not directly related to ongoing negotiations could be generated in the course of the province's dealing with foreign governments. Such information should, we believe, be the subject of an exemption for documents the disclosure of which would prejudice the international relations of the government of Canada or the relations of the government of Ontario with the government of another jurisdiction.

Although matters of national defence may appear to be a remote concern for a provincial government, especially in peacetime, this too is a subject which should not be ignored when drafting exemptions for a freedom of information scheme. Again, we emphasize that the question to be considered is not whether the province plays a significant role in such matters, but whether the province is in possession of information the disclosure of which could prejudice the interests of national defence. It is unlikely that provincial public servants will become privy to military secrets of high sensitivity. On the other hand, the presence of federal military installations within the province and the need for cooperation between the federal and provincial governments with respect to emergency planning are both matters which give

rise to the acquisition of information that could be of interest to a hostile foreign power. The fact that there may be little of interest in this respect to be found in provincial government files is not, we believe, a reason for denying protection to that which may be sought. Accordingly, we further recommend that an exemption be included in the proposed legislation which would exempt documents whose disclosure would prejudice the defence of Canada.

#### RECOMMENDATIONS

1. We recommend that the freedom of information law include exemptions for documents the disclosure of which would tend to prejudice:
  - a. the international relations of the government of Canada or the relations of the province of Ontario with other governments;
  - b. the defence of Canada.

#### F. INFORMATION RECEIVED IN CONFIDENCE FROM OTHER GOVERNMENTS

The government of Ontario may receive documents or acquire information from governments of other jurisdictions in circumstances in which it is expected that the material will be treated as confidential. Should there be an exemption for information received in confidence from other governments?

In the first place, we should note that much material of this kind would be covered by other exemptions in our proposed freedom of information scheme. For example, confidential material received from the Canadian Department of External Affairs relating to the conduct of diplomatic relations with other countries would be covered by the exemption for material relating to national defence and international relations. Further, in situations where the government supplying the information has enacted a freedom of information law, it is perhaps likely that virtually any information it would supply to the province of Ontario with an expectation of confidentiality would be not only exempt from access under its own freedom of information law but under the Ontario scheme as well. Nonetheless, instances may arise in which information is supplied by another government on the understanding that it not be disclosed to the public by representatives of the government of Ontario. It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so

might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions which we have proposed (except to the extent that the document contains "advice and recommendations") and accordingly, could only be protected on the basis of an exemption permitting the government of Ontario to honour such understandings of confidentiality.

A useful model for an exemption is provided by the Australian federal Freedom of Information Bill[34].

A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure:...would divulge any information or matter communicated in confidence by or on behalf of the Government of another country or of a State to the Government of the Commonwealth or a person receiving the communication on behalf of that Government.

We would modify this provision in two respects. The reference to "the public interest" is redundant and could, in our view, be deleted from an equivalent Ontario provision. Further, it should be noted that situations of this kind may arise with some frequency in the context of communications of the government of Ontario with the governments of state jurisdictions in the United States. Accordingly, an Ontario provision dealing with this matter should refer to information supplied in confidence by the governments of other "jurisdictions" rather than other "countries".

#### RECOMMENDATIONS

1. We recommend that the freedom of information law contain a provision exempting documents whose disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another jurisdiction to the government of the province of Ontario or a person receiving a communication on behalf of the government of Ontario.

## G. CONFIDENTIALITY PRESERVED BY OTHER STATUTES

In a previous chapter, we gave a brief account of the general nature of the more than 120 provisions of the statutes of the province of Ontario which preserve secrecy with respect to various matters. The most common of these statutory secrecy provisions reads as follows:

Each person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation...shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person[35].

There are many variations in the forms of these provisions. Many of them have been narrowly drafted to delineate specific circumstances in which confidentiality is secured.

Some provisions forbid disclosure of certain kinds of information; others regulate disclosure by permitting certain officials to exercise a discretion to withhold or disclose information. Some of the latter operate as exemptions to a general rule of secrecy imposed in the statute. For example, the Construction Safety Act[36] generally forbids the disclosure of information relating to building inspections[37] and then further provides that

The Director may communicate or allow to be communicated, disclosed or published information, material, statements or the result of a test acquired, furnished, obtained, made or received under the powers conferred by this Act and the regulations[38].

Other statutes that generally provide for publicity of information also permit the exercise of a discretion to withhold. Thus, the Environmental Assessment Act[39] provides that environmental assessments are to be made available to the public, but then goes on to say:

Notwithstanding any other provisions of this Act, where the Minister is of the opinion that compliance with any provision of this Act is causing, will cause or will likely cause the disclosure of matters that are of such a nature that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of disclosing such matters to the public, the Minister may make such order for the protection of such person or the public interest as he considers necessary or advisable[40].

In provisions such as this, the discretion to disclose or withhold is often conferred in terms that require the discretion to be exercised on the basis of the official's assessment of "the public interest."

A question which must be addressed, then, is the relationship of these existing provisions and any similar future provisions to the proposed freedom of information law. In view of their substantial number (and the considerable breadth of many), it is evident that to simply allow such provisions to subsist together with a freedom of information law would significantly undermine the effectiveness of the scheme, although each of the two types of provisions raises slightly different concerns. Nonetheless, the effect of each type is to withdraw substantial amounts of government information from the coverage of the freedom of information law. It is for this reason, presumably, that the Canadian Bar Association (CBA) has recommended that a freedom of information law should simply supersede all provisions of both kinds. In the CBA's view, future provisions of this kind would have to be drafted so as to prohibit disclosure and would expressly state that they were to operate "notwithstanding" the freedom of information act[41].

There is, however, a positive aspect to the use of these provisions which suggests to us that their use should not be precluded in a freedom of information law. The applicability of a freedom of information statute may be uncertain in some instances. A provision stating a clear rule with respect to a specific type of information may therefore usefully supplement the more general provisions of the freedom of information law, provided that the provision in question is consistent with the underlying philosophy of the freedom of information scheme. The question of granting access to information concerning a person other than the requester is a case in point. Although we have recommended a privacy exemption addressing this concern, it may be useful to supplement the general scheme with specific provisions in other statutes. The difficulty with many existing Ontario provisions is that they are drafted too expansively. If left unamended, they would have the cumulative effect of substantially impairing the operation of a freedom of information law.

Accordingly, we recommend that two measures relating to confidentiality provisions be adopted. First, an exemption should be included in the freedom of information law that will exempt information whose confidentiality is protected by other statutes. Second, with respect to provisions of this kind in existence at the time of enactment of the freedom of information statute, a specific review of each provision should be undertaken by a committee of the Legislative Assembly with a view to recommending

either repeal of unnecessary provisions or modification of necessary provisions to accord with the general approach to confidentiality adopted in the freedom of information law. To ensure that an expeditious review of this kind occurs, we recommend that existing provisions be deemed to expire two years after the enactment of the freedom of information law unless they have been reaffirmed by the legislature during that time.

Consideration must be given, then, to the form the proposed exemption relating to these provisions would take. The CBA has recommended that only "prohibitions" should be permitted to coexist with the freedom of information law. Provisions allowing for discretionary withholding or disclosure would be precluded. We are not persuaded that this is a satisfactory approach; it may encourage the use of total prohibitions on disclosure even though confidentiality needs would be adequately met by providing generally for confidentiality but permitting certain officials to exercise a discretion to disclose. Accordingly, we favour an exemption permitting both types of provisions to coexist with the freedom of information act. We therefore recommend that an exemption be included for information which is, in the terms of the 1966 U.S. act, "specifically exempted from disclosure by other statutes."

One final point must be considered. The U.S. act was amended in 1976 so as to preclude the effectiveness of provisions that permit withholding on the basis of a vague discretion to be exercised "in the public interest." A 1975 decision of the U.S. Supreme Court[42] had held that a document withheld under a provision similar to the provision in the Ontario Environmental Assessment Act reproduced above was properly considered to be "exempted from disclosure" by another statute. The 1976 amendments to the act reflected congressional concern that discretions premised on the vague "public interest" standard permitted the agency in question to effectively disregard the basic purposes of the freedom of information scheme by developing its own policies on disclosure. The amended provision reads as follows:

[agencies are not required to disclose information]  
specifically exempted from disclosure by statute provided  
that such statute (A) requires that the matter be withheld  
from the public in such a manner as to leave no discretion on  
the issue, or (B) establishes particular criteria for  
withholding or refers to particular types of matters to be  
withheld[43].

Under the amended provision, the conferral of a discretion to withhold documents must be couched in statutory language indicating the particular kinds of information to be withheld or setting

out factors to be taken into account in exercising the discretion. A similar provision was included in the federal Canadian proposed legislation, Bill C-15[44]. A limitation of this kind would have the beneficial effect of requiring legislative attention to the confidentiality policies to be adopted in those government programs intended to operate beyond the reach of the freedom of information law. Accordingly, we favour the adoption of a limitation of this kind on the use of statutory secrecy provisions.

#### RECOMMENDATIONS

1. We recommend the adoption of an exemption in the following terms:

Government institutions are not required to disclose information specifically exempted from disclosure by statute, provided that such statute (a) requires that the matter be withheld from the public in such a manner as to leave no discretion in the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
2. It should be expressly provided that the implementation of this recommendation should not affect the power of the courts or any other body exercising powers conferred on it to compel witnesses to testify or produce documents.
3. Review of statutory secrecy provisions in other statutes in existence at the time of the enactment of the freedom of information law should be undertaken by a committee of the Legislative Assembly with a view to either:
  - a. repealing unnecessary provisions, or
  - b. amending provisions so as to conform with the general principles of the proposed freedom of information legislation.
4. Statutory secrecy provisions which have neither been revised nor reaffirmed by the Legislative Assembly pursuant to the process envisaged in paragraph 3 should be deemed to expire two years after the enactment of the freedom of information law.

## H. COMMERCIAL INFORMATION

In the course of discharging their responsibilities to the public, governmental institutions collect substantial amounts of information about the activities of business firms. Some of this information, such as trade secrets, constitutes a valuable asset, and disclosure would impair a firm's ability to compete effectively in the marketplace. Existing and proposed freedom of information laws in other jurisdictions provide for an exemption relating to material of this kind. We share the view that such an exemption is a necessary feature of a freedom of information law.

Similar concerns may arise with respect to the conduct of essentially commercial activity by governmental institutions such as Crown corporations engaged in the supply of goods and services to the public. Although such institutions often enjoy a statutory monopoly and thus have little to fear from competitive activity, this is not invariably the case. Moreover, some institutions will, in the course of supplying goods and services to residents of Ontario, develop commercially valuable information and expertise which they may attempt to market on a competitive basis in jurisdictions other than Ontario. It is our view that an additional exemption relating to the proprietary information of such institutions should also be included in our proposed freedom of information scheme.

## BUSINESS INFORMATION

The language of the exemptions relating to valuable business information varies from one jurisdiction to the next; nevertheless, there appears to be agreement as to the underlying purpose of such an exemption and on the types of information which should be covered.

It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected

should, as far as is practicable, form part of the public record. For example, public scrutiny of the effectiveness with which governmental institutions discharge their responsibilities with respect to consumer protection or the protection of the environment requires information about the vigour with which enforcement mechanisms have been deployed against firms who refuse to comply with regulatory standards. The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations[45]. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity. The strength of this claim is recognized in each of the freedom of information schemes we have examined in that none of these schemes simply exempts all information relating to the activities of business concerns.

Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business firm -- its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm. It is not suggested that business firms have a general "right to privacy." To the extent that information concerning business activity may include information concerning identifiable individuals, the information may fall under another exemption relating to personal privacy. Business firms as such, however, are not accorded an equivalent "privacy" interest in the schemes we have examined. Nor is it suggested that business firms should enjoy a general right of immunity from disclosures which reveal that they have engaged in unlawful or otherwise improper activity. The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information. In all the freedom of information schemes we have examined, some means for exempting commercially valuable information is included to meet these concerns.

The second proposition limiting presumptions in favour of disclosure holds that it is desirable to permit governmental institutions to give an effective undertaking not to disclose sensitive commercial information where such undertakings are necessary to induce business firms to volunteer information useful to a governmental institution in the proper discharge of its responsibilities. There is, however, some disagreement as to whether an explicit provision for such undertakings ought to be included in a freedom of information law. The U.S. act does not contain explicit reference to this question but, as we have seen, recognition of this interest has been developed in the case law interpreting the act. The commentary accompanying the Australian Minority Report Bill suggests that such a provision should not be included for fear that it would encourage the granting of confidential status in circumstances where it was neither necessary nor appropriate. It is our view, however, that a provision of this kind can be drafted so as to indicate legitimate uses of such undertakings.

How, then, is an exemption relating to sensitive commercial information to be drafted? The principal difficulty in structuring an exemption lies in striking an appropriate balance -- one that will not impose impossible burdens of proof either on business firms who wish to assert that disclosure would be harmful, or on those who request access to government information relating to businesses. Essentially, there are three questions to be addressed in designing an exemption relating to commercial information. First, what kind of information is to be subject to the exemption? Second, should express reference be made to the competing public interest in disclosure so as to effect, in some cases, a balancing test under the exemption? Third, how should confidences extended by government be protected?

With respect to the first question, the difficulty is one of identifying the kinds of information that constitute a firm's "informational assets." First, it must be acknowledged that the concept of "trade secrets" is too narrow for the purposes of a freedom of information act exemption. There may be many kinds of information submitted to government which would be of interest to a firm's competitors but which could not be said to be "trade secrets" in the full legal sense. For example, information relating to current levels of inventory, profit margins or pricing strategies may not constitute trade secrets but they might, if disclosed, confer an unfair advantage upon a firm's competitors[46]. Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question. We

recommend, therefore, a provision drafted in terms such as the following:

A government institution may refuse to disclose a record containing a trade secret or other financial, commercial, scientific or technical information obtained from a person, the disclosure of which could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization.

A number of comments should be made with respect to this proposed formulation. First, the exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signalling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. An illustration of this point may be useful. A questionnaire filled in by a corporation would, of course, be exempt from access to the extent that it contained commercially valuable information. A document prepared by a public official containing a compilation of information from such questionnaires would also be exempt to the extent that the original information submitted by the corporation could be deduced from its contents. However, a statistical compilation of the survey results from which one could not ascertain commercially valuable information concerning specific respondents would not be exempt from access.

Second, it may be noted that the basis for exempting information is that its disclosure "could reasonably be expected to cause competitive harm." The test of competitive harm is not explicitly set forth in the U.S. act but has been identified as the appropriate test in the case law interpreting the equivalent U.S. provision. We believe that it would be useful to state the test in the provision itself. The language we have suggested is drawn from the equivalent provision of the federal Canadian proposal, Bill C-15[47].

Third, specific reference is made in the provision to the concept of "trade secrets." Although, as we have indicated, the nature of material which would be exempt under the provision is broader than that which would be protected by the law of trade secrets, it is nonetheless useful to refer to trade secrets so as to import into the provision the extensive analysis of this concept that has been developed by the courts. Commercial information which would be considered a trade secret at common law constitutes an obvious portion of the material which should be exempt under this provision. Accordingly, it is our view that express reference to this concept is appropriate.

The second general question to be addressed is whether express reference should also be made to the competing public interest in disclosure so as to effect a balancing test in the application of the exemption to cases where there may be said to be an overriding public interest in disclosure. Although we are not aware of an enacted freedom of information scheme containing a provision of this kind, a number of proposed schemes have set forth an explicit limitation on the commercial information exemption in situations where the public interest in access to information is considered to be more compelling than the commercial interest in confidentiality. Typical illustrations of this phenomenon are environmental and product testing reports. The Australian Minority Report Bill contains the following provision:

In deciding whether disclosure would expose an institution unreasonably to disadvantage, the agency shall consider and take account of the following considerations, mainly:

- ... (d) whether there are any compelling public considerations in favour of disclosure which outweigh any competitive disadvantage to the institution, for instance, the public interest in improved competition or in evaluating aspects of government regulation of trade practices or environmental controls[48].

A similar provision was set forth in the Model Bill of the Canadian Bar Association[49]. The federal Canadian proposals specifically provide that the commercial information exemption will not generally extend to a record "...that contains the results of product or environmental testing"[50].

Although we are generally disinclined to recommend adoption of provisions containing broad references to notions such as "the public interest," we believe there is a persuasive argument in favour of adopting a limitation of this kind on the operation of the commercial information exemption. The area of potential

disclosure which has given rise to these suggestions is one for which more precise and objective criteria are difficult to articulate. This point may be illustrated by reference to the experience of the U.S. courts in interpreting the FOIA (b)(4) exemption relating to commercial information. The (b)(4) exemption does not contain a public interest criterion. As a result, when ruling on requests for testing reports of various kinds, the courts have focused on the question of whether or not the information contained in such a report was truly "obtained from a person." Thus, information contained in a report of hearing-aid tests conducted by the Veteran's Administration was held to be outside the reach of the exemption inasmuch as the report contained not only information relating to the hearing aids but a report of an analysis undertaken by the government institution[51]. We suggest that such problems could be analyzed more straightforwardly if it were recognized that even though such materials may, indeed, contain information "obtained from a person" which might be eligible for exemption, there is an overriding public interest in granting access to product testing reports. In short, if the public interest in disclosure of matters relating to environmental protection, public health and safety and consumer protection is not explicitly stated, it is likely to appear in strained interpretations of other phrases in the exemption. For this reason, we recommend the adoption of a limitation of this kind, although it would not be appropriate, in our view, to include the reference suggested by the Minority Report Bill to the public interest in improved competition. We do not think that the exemptions of a provincial freedom of information scheme are appropriate mechanisms for the pursuit of competition policy objectives. We recommend that the limitation make express reference to the public interest in such matters as the protection of the environment, consumer protection and public health and safety.

The third general issue to be addressed relates to the protection of documents or information submitted on the basis of an assurance of confidentiality given by a governmental institution. Although there is recognition of the need to obtain information under such assurances, concerns have been expressed that such protection ought to be stated with precision. If, for example, an exemption were to be drafted so as to protect "any information supplied on a confidential basis," existing patterns of secrecy might be preserved on the basis of tacit or express understandings that the government would treat the information as confidential. In order to meet this concern, U.S. courts interpreting the (b)(4) exemption have indicated that apart from cases of competitive harm, undertakings of confidentiality will be recognized as a basis for applying the exemption only where failure to do so would impair the ability of the governmental

institution in the future collection of information necessary for its efficient or effective operation. In a leading case, the court commented that "unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the government to make intelligent, well-informed decisions will be impaired"[52]. The federal Canadian proposal contains a similar provision:

[The government institution may refuse to disclose a record] the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the government institution, where the information was supplied to a government institution on the basis that the information be kept confidential and where it is in the public interest that information of that type continue to be supplied to the government institution[53].

Some observers have argued that such a discretion to uphold confidences still gives too much latitude to public officials to undermine the disclosure policy underlying freedom of information legislation[54]. We feel that such views offer too pessimistic an assessment of the good faith with which public officials would exercise their responsibilities under this type of legislation. We believe that a properly confined discretion to grant assurances of confidentiality will reconcile the public interest in disclosure and the need of governmental institutions to obtain sensitive commercial information on a voluntary basis from business firms. We recommend the adoption of a provision similar to that contained in the Canadian bill.

#### GOVERNMENT COMMERCIAL INFORMATION

There are a number of governmental institutions (in particular, Crown corporations) engaged in the supply of goods and services on a competitive basis. For example, the activities of the Ontario Urban Transportation Development Corporation Limited have been briefly described in a Commission research paper[55]. The purpose of establishing the corporation was to create a publicly-funded corporate vehicle which could assume development risks associated with the improvement of conventional public transportation technologies and the design of new high quality transit systems. While the Corporation's primary objective is to assist in meeting the needs of the province of Ontario for developments in the field of transportation technology, it is also hoped that the corporation will be able to market its expertise and products on a competitive basis in other jurisdictions. In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public

access to the same extent that similar information of non-governmental organizations is protected under the statute.

A more contentious issue, however, is whether the trade secrets or saleable expertise and research of all governmental institutions should be exempt from access under the statute. The rationale of a freedom of information law appears to be inconsistent with the assertion of a general right on the part of governmental institutions to exploit proprietary information by selling it to the public. For this reason, U.S. courts have resisted the suggestion that the trade secrets of government agencies are protected under the U.S. act[56].

Although we appreciate the force of this sentiment, we do not feel that this view should be rigorously applied in the Ontario context. Government-sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited, on a profit-making basis, in the private sector. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions. The Management and Information Services Program of the Ministry of Government Services is a case in point. The program provides management consulting, systems development and computer services to ministries and agencies of the Ontario government. These services are provided on a charge-back basis to the ministries and agencies concerned, and in competition with similar services offered by private sector firms. The program obviously represents an interesting method of attempting to develop the necessary internal expertise and, at the same time, subject it to the discipline of competition from the private sector. In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

In the Australian Minority Report Bill, the general protection afforded by the commercial information exemption is reserved to agencies engaged in trade and commerce; but the trade secrets of any agency are exempted, as are documents containing the results of scientific research where the agency intends to sell those results. We recommend the adoption of similar provisions in the proposed Ontario legislation.

## RECOMMENDATIONS

1. We recommend the adoption of the following exemptions relating to commercial information:
  - a. A governmental institution may refuse to disclose a record:
    - i. containing a trade secret or other financial, commercial, scientific or technical information obtained from a person, if the disclosure of that information could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization, or
    - ii. the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the governmental institution, where the information was supplied to the institution on the basis that the information be kept confidential, and where it is in the public interest that information of that type continue to be supplied to the institution.
  - b. A governmental institution shall not refuse to disclose a record under the exemption proposed in paragraph (a), where a compelling public interest in favour of disclosure outweighs the risk of commercial disadvantage to the submitter of the information, such as the public interest in environmental protection, public health and safety, and consumer protection.
  - c. A governmental institution engaged in trade and commerce may refuse to disclose a document in accordance with the exemption set forth in paragraphs (a) and (b).
  - d. A governmental institution shall refuse to disclose a document containing a trade secret of the institution or the results of research undertaken by the institution where the institution intends to sell the results of the research.

## I. INFORMATION CREATING UNFAIR ADVANTAGE OR HARM TO NEGOTIATIONS

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project. In this section we will consider a variety of problems of this kind.

It will be helpful to illustrate the kinds of problems to be addressed. Premature knowledge of the intentions of the Ontario Housing Corporation to acquire land, for example, might impair the ability of the corporation to purchase the land at fair market value. Where a substantial residential complex is proposed, persons with advance knowledge of the project might be able to exploit unfairly their knowledge by acquiring neighbouring properties for speculative purposes at less than their true value to the current owner. Governmental institutions supplying goods or services to the public may wish to announce price increases in such a way as to reduce the possibility of individuals hoarding items acquired at a lower price, or to give all members of the public an equal opportunity to make purchases before the rate change. The Ontario Securities Commission may wish to time announcements of certain decisions so as to minimize disruption of transactions in the stock market; an announcement may be made after the close of trading on a Friday afternoon in order to reduce unfair advantage to market insiders who would otherwise be able to react quickly and advantageously to an announcement made while the exchanges remained open for trading. In short, there are a number of situations in which premature disclosure of decisions could either impair the implementation of the decision or create unfair advantages for certain groups or individuals.

Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively. Similarly, it is clearly in the public interest that governmental institutions be able to effectively engage in testing procedures. Disclosure of

certain kinds of information about those procedures might substantially undermine their effectiveness. An obvious illustration (which is the subject of explicit exceptions in the U.S. state level open records laws) would be the obtaining of advance notice of test questions by examinees who are perspicacious enough to request a copy of the examination under the freedom of information law.

In our view, adequate provision should be made in a freedom of information law to exempt materials of these kinds. None of the exemptions which we have proposed thus far appears to adequately accommodate the problematic aspects of disclosing such material. Essentially, there are four matters to be addressed:

1. premature disclosures creating unfair advantage;
2. disclosures affecting the government's ability to engage in economic transactions;
3. disclosures relating to negotiating strategy;
4. disclosures relating to testing material.

#### UNFAIR ADVANTAGE

Premature release of Cabinet decisions would have the most serious consequences in creating opportunities for unfair advantage. For this reason, among others, we recommended that documents reflecting Cabinet deliberations, including Cabinet decisions, should be exempt from the general freedom of information principle: the timing of public disclosure of decisions of other governmental institutions may create similar difficulties. We therefore propose a general exemption for documents whose disclosure would prematurely reveal an intention or a decision of a governmental institution to introduce a policy or proceed with a project, where premature disclosure of such information could reasonably be expected to result in undue loss or gain to any person.

#### GOVERNMENT TRANSACTIONS

We have suggested that the premature disclosure of government intentions to acquire land could impair the ability of the government to purchase the land at its fair market value. This concern may also arise in the general context of investments by government, and in particular with respect to the purchase of goods and services. We recommend that the legislation include an

exemption for documents whose disclosure would reveal a proposed economic transaction of a governmental institution, if disclosure of the document could reasonably be expected to adversely affect the government's ability to protect its legitimate economic interests.

#### NEGOTIATING STRATEGY

The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

An agency may refuse to disclose:

a document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest[57].

We favour the adoption of a similar provision in our proposed legislation.

#### TESTING MATERIALS

As we have suggested, the use of testing and related materials could be wholly frustrated by premature disclosure. Moreover, there may be areas where the limited nature of the subject matter and the kinds of questions that can be formulated lead to the use of testing material on a repetitive basis. A provision contained in the federal Canadian proposals, Bill C-15, adequately protects such material in the following terms:

The head of a government institution may refuse to disclose a record requested under this Act where the record contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or

audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits[58].

#### RECOMMENDATIONS

1. We recommend the adoption of the following exemptions in the proposed freedom of information law. A governmental institution may refuse to disclose:
  - a. documents whose disclosure would prematurely reveal the intentions of the governmental institution to introduce a policy, proceed with a project, or implement a decision made with respect to such matters where premature disclosure of such information could reasonably be expected to result in undue loss or gain to any person;
  - b. a document whose disclosure would reveal a proposed economic transaction of the institution, where disclosure could reasonably be expected to adversely affect the institution's ability to protect its legitimate economic interests;
  - c. a document containing instructions to public officials on procedures to be followed and criteria to be applied in negotiations, including financial, commercial, labour and inter-governmental negotiations, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the institution to the detriment of the public interest;
  - d. a document containing information relating to testing or auditing procedures, techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits.

#### J. PERSONAL PRIVACY

One of the most vexing issues in the design of a freedom of information policy is the establishment of a proper balance between the public interest in access to government information and the public interest in the protection of individual privacy. Obviously, the privacy concern must be accommodated by an exemption from the general principle of openness. The proper structure of such an exemption, however, is not easily discerned.

As a preliminary point, we should emphasize that we are here considering the privacy problem that arises when one individual seeks access to a government file containing information about another individual. The question of whether the individual should invariably have access to government files containing information about himself is the subject of recommendations forming part of our proposed privacy protection scheme[59].

One possible approach would be to simply exempt from access all documents (or portions thereof) containing personal information relating to another individual. We do not feel, however, that the privacy protection interest should be considered as absolute. It is an important value, of course, but one which must yield on occasion to the public interest in access to government information. Although each individual might prefer to mask all information concerning himself from others, the rationale of open government provides a competing interest which, in appropriate cases, will have a higher claim. Thus, while government employees may not enjoy having their salaries disclosed, the public has an interest in this information; this is evidenced by the fact that the government of Ontario now publishes information concerning the salaries of public servants above a certain level of classification. Similarly, information about individuals may be instrumental in permitting public-spirited citizens to determine whether government agencies have behaved in a manner contrary to the public interest. Further, files such as inspection reports, containing some information about other individuals, might be used for such purposes as the promotion of public health and safety, or the dissemination to consumers of information relating to defective products or failure to comply with government standards. Some reconciliation of these interests must be effected under a freedom of information act scheme. How is this to be achieved?

The solution adopted in section (b)(6) of the U.S. Freedom of Information Act (FOIA) and in many state laws was to include a "balancing" test in the freedom of information exemption itself. Thus, the U.S. act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The effect of this provision is to require that the competing interests in confidentiality and publicity be weighed in each request for access. The U.S. act provides for ultimate judicial review; accordingly, guidelines for the resolution of these problems will emerge through the accretion of judicial precedent dealing with this issue. The U.S. experience under this provision will be considered below, but it should be noted that in our opinion a "balancing" test of this kind offers insufficient guidance to decision makers saddled with the task of responding to requests for access.

A third approach to the problem might involve identifying certain types of particularly sensitive personal information and imposing in those cases an absolute rule of confidentiality. This device may offer some prospect of greater certainty, but it is not, we believe, a desirable solution to this problem. The competing interests of publicity and confidentiality cannot be reconciled simply by assessing the sensitivity of the information alone. Reconciliation is best achieved by weighing the sensitivity of the information against the interest of the person seeking the information and the extent to which this interest coincides with a compelling public interest in access. For example, medical or psychiatric information might be logical candidates for the "highly sensitive" category. Nonetheless, it is easy to hypothesize situations in which the public interest in the health and safety of either the subject of the record or others with whom the subject might have had contact (or may currently be threatening) would give rise to an arguable case for disclosure. Conversely, directory information (names and addresses) appears not to be particularly sensitive, yet there may be a strong argument for refusing to disclose mailing lists to the purveyors of junk mail. In short, an assessment based only on the sensitivity of the information takes into account only one-half of the publicity/confidentiality equation.

A fourth possibility would be to attempt to identify certain files or data banks which require confidentiality, and to either list them specifically in the freedom of information law or provide for their confidentiality in the specific statutes pursuant to which the information has been gathered. The evident difficulty with this approach lies in its incompleteness. Although it might be possible to identify all personal data systems, it is not possible to list all files in which personal information is contained. Nor is it possible to anticipate in statutory language all future systems or files. Inevitably, then, a scheme of some kind must be put in place to deal with requests for access to documents not covered by specific statutory provisions. We should note, however, that many provisions relating to specific information contexts have already been enacted in Ontario. Many of the "statutory secrecy provisions" discussed above[60] have as their obvious purpose the protection of personal privacy. Whatever the merit of the particular provisions, it is evident that they do not offer a satisfactory solution to the more general problem of designing a privacy exemption to the freedom of information scheme.

Ultimately, then, we have concluded that a "balancing" test of some kind must be embodied in the privacy exemption. In order to provide clearer guidance than is afforded by the "unwarranted invasion of privacy" test, we propose that the test adopted in the statute meet these requirements:

- the statute should, to the greatest extent possible, identify clearly situations in which there is an undeniably compelling interest in access;
- for those cases not resolved by such explicit provisions, a general balancing test should be stated with some indication of the factors to be weighed in an application of the test to a particular document;
- as part of the criteria set forth for the application of the balancing test, personal information which is generally regarded as particularly sensitive should be identified in the statute and made the subject of a presumption of confidentiality.

Although we favour the adoption of a balancing test, there is obviously a strong argument for permitting such a test to coexist peacefully with specific statutory provisions dealing with certain kinds of records. If the legislature concludes that trade union member certification votes or interview notes relating to children involved in custody disputes should be granted absolute confidentiality, specific statutory provisions rendering such information confidential may be a much more desirable means of reconciling the publicity/confidentiality tension than the delegation of the matter to an adjudicator, who would apply a (necessarily somewhat vague) balancing test. We reiterate here, however, our view that the existing "statutory secrecy provisions" are, in many instances, more broadly drafted than is necessary to meet such concerns. For this reason, we have recommended that they be subjected to review by the legislature on a case-by-case basis[61].

In order to prepare the ground for our detailed proposals for a refined balancing test, it may be useful to give brief accounts of the following matters:

- the U.S. jurisprudence interpreting the "clearly unwarranted invasion of privacy" test;
- the recommendations of the Canadian Civil Liberties Association for reconciling the competing interests in confidentiality and publicity;
- the work of the Privacy Committee of the U.S. National Conference of Commissions on Uniform State Laws (NCCUSL).

## THE U.S. FREEDOM OF INFORMATION ACT

As mentioned above, the U.S. act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As well, of course, section (b)(3) of the U.S. statute permits the withholding of material exempted from disclosure by any other statute (subject to certain conditions). Thus, the FOIA balancing test only applies to documents which have not been satisfactorily exempted from disclosure by some other statute.

The FOIA balancing test provision has spawned substantial litigation; a brief review will highlight a number of issues which we believe should be addressed in explicit terms in a legislative restatement of the test[62].

1. Defining the nature of the subject file. There has been some discussion in the case law as to the precise meaning of the phrase "personnel and medical files and other similar files." The prevailing view appears to be that the phrase should be broadly construed and would include, for example, "information regarding marital status, legitimacy of children, medical condition, welfare payments, alcohol consumption, family fights, reputation, and so on"[63].
2. Is the entire "file" exempt? Apparently some agencies took the position that the exemption applied to entire "files." Judicial interpretation has made it clear that segregable portions of files must be made available.
3. Significance of the phrase "clearly unwarranted." The mere fact that an invasion of privacy may occur from disclosure of a record will not suffice as a basis for exemption. It might be argued that any disclosure of personal information is to some degree an invasion of privacy. However, the exemption requires that the degree of the invasion be balanced against the public interest in disclosure. The U.S. Supreme Court has said that the phrase "clearly unwarranted," requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny"[64].
4. Is the requester's need to know relevant? As a general rule, the accessibility of information under the FOIA does not depend on the requester's purpose in seeking information. The "merely curious" citizen is entitled to government information without demonstrating a pressing need for it. Access to the information in question will be given to any

citizen, regardless of interest, so long as disclosure does not amount to a "clearly unwarranted invasion of privacy." On a few occasions, courts have recognized that the individual requester's reasons for seeking access may be a pertinent consideration. Thus, it is possible that access might be given to individuals who have a compelling interest in the information, even though disclosure of that same information might amount to a clearly unwarranted invasion of privacy if given to the merely curious. In one well-known case[65], law professors specializing in labour relations were given access to the names of the union members who had voted for certification of a trade union; the requesters, who were engaged in bona fide research, had a direct interest in the information. Such information would normally be denied to the union members' employers or other merely curious requesters. The court felt that the qualifications of those applicants and the soundness of the design of the research project were pertinent considerations. On the other hand, the requester's lack of compelling interest may also be considered relevant. In one case[66], a court held that building a customer solicitation list was not a sufficient interest to warrant disclosure. For the most part, however, U.S. courts have balanced the privacy interest against the general public interest in access to the information in question.

5. Is it relevant that the information was supplied by the subject on the basis of an agency undertaking that it would be treated confidentially? There does not appear to be much judicial discussion of this point in the United States. One court has suggested that an agency promise of confidentiality may be a factor in determining whether a particular privacy invasion is "clearly unwarranted"[67]. Failure to treat an undertaking of confidentiality as binding is consistent with the interpretation which the courts have given the commercial information exemption. It is also consistent with the view that invasions of privacy may be warranted in certain cases. No doubt, the promise of confidentiality may increase the seriousness of the invasion. Nonetheless, it may be outweighed, apparently, by a public interest in disclosure.

In summary, then, the vague standard set out in the act has been refined to some extent in the U.S. case law. It may be said, however, that agency officials and others who must apply the test are left without specific guidance as to whether a particular invasion of privacy is "clearly unwarranted."

Although some U.S. writers have been critical of failure of the act to set clear standards for the reconciliation of privacy and access interests, they have not suggested any solution to this

problem other than the establishment of an agency which would make policy determinations as to how the balance should be achieved on a case-by-case basis[68].

#### THE BRIEF OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

The brief[69] presented to this Commission by the Canadian Civil Liberties Association set forth a number of guidelines which the Association felt might be of assistance in attempting to reconcile the competing claims of confidentiality and publicity. The association proposed these guidelines:

1. The decision to disclose or withhold identifying material should depend upon which alternative would better fulfill the policy of the statute under which the information was acquired.
2. The susceptibility to disclosure of identifying material should be reduced in those situations where the freedom of information goals are readily amenable to fulfillment in some other way.
3. The susceptibility to disclosure of identifying material should increase in accordance with the number and effectiveness of the de facto safeguards which might have operated in favour of the person affected.
4. The susceptibility to disclosure of identifying material should be reduced on the basis of reasonable misgivings concerning its reliability.
5. The susceptibility to disclosure of identifying material should be reduced to the extent that it is seen as a likely impediment to a fair hearing.
6. The susceptibility to disclosure of identifying material should be increased to the extent that it is necessary to a fair hearing.
7. The susceptibility to disclosure of identifying material should increase with the age of a document and the lack of action with respect to it.
8. The susceptibility to disclosure of identifying material should increase on the basis of the imminence and seriousness of potential hazards to the lives, limbs and health of members of the public.

9. The susceptibility to disclosure of identifying material should be reduced to the extent of the anticipated dangers to the lives, limbs and health of those identified.

THE PRIVACY ACT COMMITTEE OF THE U.S. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL)

In the course of preparing working drafts for a proposed Uniform Privacy Act, the NCCUSL Privacy Act Committee addressed the question of the limitations to be imposed on disclosure of personal information by government agencies. During its deliberations, the committee became concerned that the "clearly unwarranted invasion of privacy" test typically adopted in U.S. freedom of information laws did not offer sufficiently clear guidance for reconciling the competing interests in confidentiality and publicity. Accordingly, the committee has been experimenting with draft statutory language, which would establish a set of more precise criteria indicating the kinds of considerations to be weighed in an application of the balancing test. In general terms, the proposed language attempts to identify and describe situations where disclosure is clearly warranted, and to identify a category of "sensitive" personal information which would not be available to the public in normal circumstances. However, neither the committee nor the conference has reached a final conclusion on this matter, and it is possible that the more traditional U.S. view will find its way into the final draft. We have derived much assistance from our review of these working papers, however, and are grateful to the conference and the committee for making them available to us.

Against this background, then, we turn to our own recommendations. As indicated above, we feel that the statute should set forth a balancing test containing these elements:

1. a list of situations in which the interest in public access is deemed to override privacy interests;
2. for all other situations, a "residual" balancing test which indicates pertinent factors to be reviewed in applying the test;
3. a definition of sensitive personal information subject to a presumption of confidentiality.

With respect to the first point, a number of situations in which the public interest in access should prevail may be identified. Obviously, access to information should generally be allowed where the subject individual has consented to its release,

provided, of course, that the individual is himself entitled to access[70]. Further, we believe that where access to personal information is necessary in order to respond appropriately to an emergency situation involving serious risk to the health or safety of an individual, access should invariably be allowed. A third situation in which disclosure should be the general rule relates to those collections of personal information gathered by the government for the purpose of creating a public record or register. The Ontario Personal Property Security Register, described in chapter 27 of this report, is an example of this phenomenon. There are many other registers of this kind maintained by provincial and local government institutions in Ontario. The statutory provision should clearly indicate that public access to registers of this kind is not inhibited in any respect by the privacy exemption. Further, there are a number of statutory provisions in force in Ontario which make available to the public certain kinds of information, some of which may pertain to named individuals[71]. Disclosure pursuant to provisions of this kind should be permitted by the privacy exemption.

Finally, we recommend that the public interest in access to government information for research purposes be expressly addressed in this provision and identified as a basis for providing access to personal information. However, the circumstances in which research access is allowed should be carefully circumscribed and appropriate terms and conditions for the use of such data should be imposed in order to ensure that confidentiality is preserved. We here draw support from the recommendations of the U.S. Privacy Protection Study Commission (PPSC). The commission has suggested the following criteria as a basis for granting research access to personal data[72].

[An agency may disclose any individually identifiable record] for use as a research or statistical record, provided, however, that the agency:

- (A) determines that such use or disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected, or obtained;
- (B) determines that the research or statistical purpose for which the use or disclosure is to be made:
  - (i) cannot be reasonably accomplished unless the information is provided in individually identifiable form; and

- (ii) warrants the risk to the individual which additional exposure of the information in the record in individually identifiable form might bring;
- (C) takes reasonable affirmative steps to assure that the recipient:
  - (i) will take adequate steps to comply with the requirements of subsection (e)(1)(E) [relating to standards for the maintenance of appropriate security precautions] of this section; and
  - (ii) will remove or destroy the individual identifier or identifiers associated with the record or records at the earliest time at which such removal or destruction can be reasonably accomplished consistent with the purpose of the research or statistical project;
- (D) prohibits any subsequent use or disclosure of the record in individually identifiable form without the agency's express authorization; and
- (E) secures a written statement attesting to the recipient's understanding of, and willingness to abide by, the conditions of [this subsection] of this section in those instances in which the recipient is not an officer or employee of the agency.

Although we are in general agreement with those proposals, we wish to ensure that statutory provisions relating to research access to identifiable personal data are in accord with the approach taken under the U.S. FOIA and, in particular, with the decision in Getman v. NLRB. With this object in view, we would alter the PPSC proposals in two respects. First, in setting out criteria for approving access for such purposes, mention should be made of two factors considered relevant by the Getman court: the competence of the researchers making the request and the soundness of the research proposal. We believe that both factors are highly material and that they should be specifically mentioned in the section. Second, it may be noted that under the PPSC proposals, the decision to grant access is ultimately left to agency discretion. In Getman, however, access was granted as a matter of right. We believe that the latter approach is preferable. The importance of access to government information for research purposes, attested to in Getman and considered at length in Professor Flaherty's Commission paper[73], is such that access should be granted as a freedom of information right. Moreover, there is the possibility that where the ultimate effect of

research may be to expose inadequacies in government programs, the officials in possession of pertinent information may find themselves in a position of conflict of interest. Further, if the access question is left simply to the discretion of the officials concerned, there may be a perception on the part of the research community, whether warranted or not, that access will be more readily given to those who are sympathetic to the aims or policies of the particular department or agency, or of the government in general. It is important, we believe, that such concerns be groundless in fact and be seen to be so.

We are, of course, concerned that proper confidentiality safeguards be imposed on those who gain access to personal information for research purposes. In Volume 3 of this report, where we set out our privacy protection proposals, we recommend the establishment of a Data Protection Authority (DPA) to supervise personal record-keeping practices in the government of Ontario. We believe that this authority should be empowered to impose terms and conditions relating to the security and confidentiality of data being used for research purposes.

It is our view that, apart from the foregoing circumstances, decisions to grant or deny access should be made on the basis of a residual balancing test pursuant to which the public interest in access will be measured against the individual's interest in the protection of personal privacy. Access should be granted, in the words of the U.S. test, when it does not constitute an "unwarranted invasion of privacy." However, we believe that clearer guidance could be afforded to public servants (and adjudicators) attempting to apply this test by indicating explicitly a number of relevant factors. In determining whether a particular invasion of privacy is warranted, these guidelines, among others, may be considered:

1. whether information is necessary for the purpose of subjecting the activities of the government of the province and its agencies to public scrutiny;
2. whether access to the information sought may promote public health or safety;
3. whether access to the information sought will promote informed choice in the purchase of goods and services;
4. whether the requested information is relevant to a fair determination of rights affecting the requester;
5. whether the record subject will be exposed unfairly to substantial harm, pecuniary or otherwise;

6. whether the information is of a highly sensitive personal nature;
7. whether the information is unlikely to be accurate or reliable;
8. whether the information has been supplied by the data subject in confidence.

We further recommend that an attempt be made to identify the types of personal information which are likely to be regarded as sensitive by the data subject, and that access to such data be presumed, as a general rule, to "constitute an unwarranted invasion of privacy."

Having attempted to reduce the number of cases in which the balancing test must be applied, and having structured the balancing test in such a way as to indicate the nature of the competing considerations to be weighed in its application, much of the uncertainty produced by the U.S. "clearly unwarranted invasion of privacy" test should be avoided.

#### RECOMMENDATIONS

1. An exemption to the general principle of access should be made to protect personal privacy. The exemption should contain these features:
  - a. a list of situations in which there is an overriding interest in disclosure;
  - b. a balancing test permitting disclosure not amounting to an "unwarranted invasion of privacy" and indicating a range of factors to be taken into account in applying this test;
  - c. a definition of sensitive personal information which is to be subject to a presumption of confidentiality.
2. With respect to item 1(a) the following is proposed:

No individually identifiable record shall be disclosed by any means of communication to any person other than the individual to whom the record pertains unless the disclosure is:

- a. pursuant to a written request by, or with the prior written consent of, the individual to whom the record

refers (provided that the record is one which the individual himself is entitled to see);

- b. pursuant to a showing of compelling circumstances affecting the health or safety of any individual, if upon disclosure notification thereof is transmitted to the last known address of the individual to whom the record pertains;
- c. of information collected and maintained specifically for the purpose of creating a record available to the general public;
- d. pursuant to a statute of Ontario or Canada that expressly authorizes the disclosure;
- e. for a research purpose if
  - i. the use or disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected or obtained;
  - ii. the research purpose for which the disclosure is to be made:
    - A. cannot be reasonably accomplished unless the information is provided in individually identifiable form; and
    - B. warrants the risk to the individual which additional exposure of the information might bring;
  - iii. the qualifications of those who will conduct the research warrant the conclusion that the research objectives will be satisfactorily achieved;
  - iv. the research proposal is soundly designed in terms of its ability to achieve the stated research objectives, its cost effectiveness, and its reduction, to the extent practicable, of the inconvenience of those public servants or agencies who are the custodians of the data in question; and
  - v. terms and conditions relating to:
    - A. the security and confidentiality of the data;

- B. the destruction of the individual identifier or identifiers associated with the record at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research or statistical project;
- C. the prohibition of any subsequent use or disclosure of the record in individually identifiable form without the express authorization of the department or agency from which the data is to be obtained

have been approved by the Ontario Data Protection Authority and the recipient has filed with the D.P.A. a written statement attesting to his understanding of, and willingness to abide by, such terms and conditions;

- f. determined not to constitute an unwarranted invasion of personal privacy.
3. With respect to item 1(b) the following is proposed:

In determining whether a particular invasion of privacy is, in the circumstances, warranted, the following factors, among others, may be considered:

- a. whether the information is necessary for the purpose of subjecting the activities of the province and its agencies to public scrutiny;
- b. whether access to the information sought may promote public health and safety;
- c. whether access to the information sought will promote informed choice in the purchase of goods and services;
- d. whether the requested information is relevant to a fair determination of rights affecting the requester;
- e. whether the record subject will be exposed unfairly to substantial harm, pecuniary or otherwise;
- f. whether the information is of a highly sensitive personal nature;
- g. whether the information is unlikely to be accurate or reliable;

- h. whether the information has been supplied by the data subject in confidence.
4. With respect to item 1(c) the following is proposed:

In the absence of a substantial interest in public access, disclosure will be presumed to constitute a clearly unwarranted invasion of personal privacy in personal records:

- a. relating to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, other than information confirming an individual's presence in a health care facility;
- b. compiled and identifiable as part of an investigation into a possible violation of criminal law except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- c. relating to eligibility for social service or welfare benefits or to the determination of benefit levels;
- d. relating to employment history, other than an individual's acts as a government employee or officer and the fact of government employment, including the position held and the level of compensation;
- e. obtained on an income or similar tax return or gathered by an agency for the purpose of administering an income or similar tax;
- f. describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- g. which are personal recommendations or evaluations, character references or personnel evaluations;
- h. indicating racial or ethnic origin or religious or political beliefs and associations; or
- i. required to be kept confidential by law.

K. SOLICITOR-CLIENT PRIVILEGE

Confidential communications between a lawyer and his client have traditionally been protected from disclosure by the common-law doctrine of solicitor-client privilege[74]. In general terms,

the doctrine applies to communications arising in the context of the giving of legal advice. Confidential communications between lawyer and client are protected; the privilege extends not only to the advice given to the client by the lawyer, but also to confidential communications of factual information exchanged between them. The underlying premise of the doctrine is that full and frank confidence between a client and his legal advisor is necessary for proper consultation and the rendering of effective legal assistance[75]. The purpose of the privilege is to afford certain protections in the client's interest. Accordingly, the privilege can be waived by the client should he wish to disclose the nature of the communications he has had with his lawyer.

Suggestions have been made by others to the effect that material subject to solicitor-client privilege should be the subject of an express exemption under a freedom of information law. The Australian federal freedom of information bill contains the following provision[76]:

1. A document is an exempt document if its disclosure under this Act would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of an agency in or in relation to pending or likely legal proceedings.
2. A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
3. A document of the kind referred to in sub-section 7(1) [the "internal law" provision] is not an exempt document by virtue of sub-section (2) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7(1).

Would an exemption of this kind be desirable in an Ontario freedom of information scheme? As a preliminary point, we must consider whether such an exemption would be superfluous in view of the exemptions already recommended in this report. It may be noted that legal advice, as such, would be protected from disclosure by the general exemption relating to advisory opinions. To this extent, an exemption based on solicitor-client privilege would be superfluous. The privilege extends, however, to communications of factual information between solicitor and client. Moreover, the doctrine has been interpreted to apply to materials obtained by the solicitor from third parties (including

written opinions of experts who have performed tests or offered professional opinions, statements taken from witnesses, or reports prepared by investigators) provided that such material has been obtained by the solicitor for the purpose of preparing and presenting his client's case. As we have indicated previously, it is our view that factual information relating to the conduct of public affairs should not normally be exempt from the general rule of public access: thus, the factual information contained in communications between the government and a solicitor providing legal advice, or in materials obtained by the solicitor from third parties for the purpose of preparing and presenting the government's case, would not be exempt under the recommendations made thus far. The question to be considered now is whether an exemption based on solicitor-client privilege should be included in a freedom of information law.

A persuasive argument can be made for exempting the kinds of factual materials described above during the period when litigation involving the government is either pending or considered a likely possibility. To grant access to this material would permit opposing parties to disrupt the preparation of the government's case and to obtain an advantage in preparing for adversarial proceedings. This premature disclosure of the government's case could unreasonably handicap the government in its conduct of the litigation. For this reason (and to this extent), we therefore favour the adoption of an appropriate exemption.

It is not our view, however, that factual material prepared for such purposes should remain forever exempt from access under the freedom of information law. For example, a statistical study of the operations of a particular program prepared for the purpose of pending litigation should normally become available to the public upon completion of the litigation. Accordingly, we recommend that the exemption for materials covered by solicitor-client privilege be limited to materials relating to pending or likely future litigation. In this respect, our recommendations are consistent with those made by the Australian Senate Standing Committee on Constitutional and Legal Affairs in its report on the federal Australian bill. The committee recommended that section 31 of the bill be revised by deleting subsection 1 (on the ground that it is redundant) and that subsection 2 be revised to read as follows:

A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which the Commonwealth or an agency is or may be a party, on the ground of legal professional privilege.

We favour the adoption of an exemption in similar terms, coupled with the limitation expressed in section 31(3) to the effect that legal opinions which have acquired the status of "internal law" should not be considered exempt as privileged documents.

#### RECOMMENDATIONS

1. We recommend the adoption of an exemption based on the doctrine of solicitor-client privilege in the following terms:
  - a. A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which a provincial governmental institution is or may be a party, on the ground of legal professional privilege.
  - b. A document of the kind referred to in item 1(a) is not an exempt document if it is used by governmental institutions as a source of "internal law," that is to say, as a source of guidance or policy for the making of decisions concerning individuals.

#### L. RECOMMENDATIONS

#### CABINET DOCUMENTS

1. We recommend that the freedom of information law contain an exemption for documents whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:
  - a. agenda, minutes or other records of the deliberations or decisions of Cabinet or its committees;
  - b. records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet minister to Cabinet;
  - c. records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Cabinet minister to Cabinet for consideration by Cabinet in making decisions, before such decisions are made;

- d. records used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- e. records containing briefings to Cabinet ministers in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;
- f. draft legislation.

#### ADVICE AND RECOMMENDATIONS

- 2. We recommend that the freedom of information law include an exemption for documents containing advice or recommendations of public servants and consultants retained by a governmental institution, provided that the exemption should not be construed to include documents of the following kinds:
  - a. an explanation or interpretation of a decision previously made by a governmental institution;
  - b. a document that has been expressly referred to by the institution as containing the reasons for or justification of a decision made by the institution;
  - c. "internal law," as defined in our proposals in Chapter 12.

#### LAW ENFORCEMENT

- 3. We recommend that the freedom of information law provide that in replying to a request for a document or documents or their contents which fall into any of the categories hereinafter set out in this paragraph, the government be empowered to reply that the request falls within such categories, and the government refuses to disclose the existence or non-existence of such document or documents. The categories herein referred to are documents which could reasonably be expected to:
  - a. interfere with an enforcement proceeding;
  - b. interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding might be reasonably expected to eventuate;

- c. interfere with the gathering of intelligence information on organizations or individuals;
  - d. reveal investigative techniques and procedures currently in use or likely to be used;
  - e. disclose the identity of a confidential source of information, or disclose information furnished only by that confidential source;
  - f. endanger the life or physical safety of persons engaged in law enforcement activity;
  - g. deprive a person of a fair trial or impartial adjudication;
  - h. endanger the security of a building, or the security of a vehicle carrying items, or of a system or procedure for the protection of items, for which protection is reasonably required;
  - i. facilitate the escape from custody of a person who is under lawful detention or who could otherwise be expected to jeopardize the security of a centre for lawful detention; or
  - j. otherwise be helpful in the commission of criminal or regulatory offences, or tend to restrict the detection of crime.
4. The preceding recommendation should not be construed to include:
- a. a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis;
  - b. a report prepared in the course of routine inspections or investigations by an agency that has the function of enforcing and regulating compliance with a particular law of Ontario.
5. We further recommend that the freedom of information law provide that a refusal by a governmental institution to confirm or deny the existence of a document which falls into the exemption in paragraph 3 above be subject to review by the Director of Fair Information Practices.

## INTERNATIONAL RELATIONS AND NATIONAL DEFENCE

6. We recommend that the freedom of information law include exemptions for documents the disclosure of which would tend to prejudice:
  - a. the international relations of the government of Canada or the relations of the province of Ontario with other governments;
  - b. the defence of Canada.

## INFORMATION RECEIVED IN CONFIDENCE FROM OTHER GOVERNMENTS

7. We recommend that the freedom of information law contain a provision exempting documents whose disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another jurisdiction to the government of the province of Ontario or a person receiving a communication on behalf of the government of Ontario.

## CONFIDENTIALITY PRESERVED BY OTHER STATUTES

8. We recommend the adoption of an exemption in the following terms:

Government institutions are not required to disclose information specifically exempted from disclosure by statute, provided that such statute (a) requires that the matter be withheld from the public in such a manner as to leave no discretion in the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

9. It should be expressly provided that the implementation of this recommendation should not affect the power of the courts or any other body exercising powers conferred on it to compel witnesses to testify or produce documents.
10. Review of statutory secrecy provisions in other statutes in existence at the time of the enactment of the freedom of information law should be undertaken by a committee of the Legislative Assembly with a view to either:
  - a. repealing unnecessary provisions, or

- b. amending provisions so as to conform with the general principles of the proposed freedom of information legislation.
- 11. Statutory secrecy provisions which have neither been revised nor reaffirmed by the Legislative Assembly pursuant to the process envisaged in paragraph 10 should be deemed to expire two years after the enactment of the freedom of information law.

#### COMMERCIAL INFORMATION

- 12. We recommend the adoption of the following exemptions relating to commercial information:
  - a. a governmental institution may refuse to disclose a record:
    - i. containing a trade secret or other financial, commercial, scientific or technical information obtained from a person, if the disclosure of that information could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization, or
    - ii. the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the governmental institution, where the information was supplied to the institution on the basis that the information be kept confidential, and where it is in the public interest that information of that type continue to be supplied to the institution.
  - b. a governmental institution shall not refuse to disclose a record under the exemption proposed in paragaph 12 (a) where a compelling public interest in favour of disclosure outweighs the risk of commercial disadvantage to the submitter of the information, such as the public interest in environmental protection, public health and safety, and consumer protection.
  - c. a governmental institution engaged in trade and commerce may refuse to disclose a document in accord with the exemption set forth in paragraphs 12(a) and 12(b).

- d. a governmental institution shall refuse to disclose a document containing a trade secret of the institution or the results of research undertaken by the institution where the institution intends to sell the results of the research.

#### INFORMATION CREATING UNFAIR ADVANTAGE OR HARM TO NEGOTIATIONS

- 13. We recommend the adoption of the following exemptions in the proposed freedom of information law. A governmental institution may refuse to disclose:
  - a. documents whose disclosure would prematurely reveal the intentions of the governmental institution to introduce a policy, proceed with a project, or implement a decision made with respect to such matters where premature disclosure of such information could reasonably be expected to result in undue loss or gain to any person;
  - b. a document whose disclosure would reveal a proposed economic transaction of the institution, where disclosure could reasonably be expected to adversely affect the institution's ability to protect its legitimate economic interests;
  - c. a document containing instructions to public officials on procedures to be followed and criteria to be applied in negotiations, including financial, commercial, labour and inter-governmental negotiations, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the institution to the detriment of the public interest;
  - d. a document containing information relating to testing or auditing procedures, techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits.

#### PERSONAL PRIVACY

- 14. An exemption to the general principle of access should be made to protect personal privacy. The exemption should contain these features:

- a. a list of situations in which there is an overriding interest in disclosure;
  - b. a balancing test permitting disclosure not amounting to an "unwarranted invasion of privacy" and indicating a range of factors to be taken into account in applying this test;
  - c. a definition of sensitive personal information which is to be subject to a presumption of confidentiality.
15. With respect to item 14(a) the following is proposed:

No individually identifiable record shall be disclosed by any means of communication to any person other than the individual to whom the record pertains unless the disclosure is:

- a. pursuant to a written request by, or with the prior written consent of, the individual to whom the record refers (provided that the record is one which the individual himself is entitled to see);
- b. pursuant to a showing of compelling circumstances affecting the health or safety of any individual, if upon disclosure notification thereof is transmitted to the last known address of the individual to whom the record pertains;
- c. of information collected and maintained specifically for the purpose of creating a record available to the general public;
- d. pursuant to a statute of Ontario or Canada that expressly authorizes the disclosure;
- e. for a research purpose if
  - i. the use or disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected or obtained;
  - ii. the research purpose for which the disclosure is to be made:
    - A. cannot be reasonably accomplished unless the information is provided in individually identifiable form; and

- B. warrants the risk to the individual which additional exposure of the information might bring;
- iii. the qualifications of those who will conduct the research warrant the conclusion that the research objectives will be satisfactorily achieved;
- iv. the research proposal is soundly designed in terms of its ability to achieve the stated research objectives, its cost effectiveness, and its reduction, to the extent practicable, of the inconvenience of those public servants or agencies who are the custodians of the data in question; and
- v. terms and conditions relating to:
  - A. the security and confidentiality of the data;
  - B. the destruction of the individual identifier or identifiers associated with the record at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research or statistical project;
  - C. the prohibition of any subsequent use or disclosure of the record in individually identifiable form without the express authorization of the department or agency from which the data is to be obtained

have been approved by the Ontario Data Protection Authority and the recipient has filed with the D.P.A. a written statement attesting to his understanding of, and willingness to abide by, such terms and conditions;

- f. determined not to constitute an unwarranted invasion of personal privacy.
16. With respect to item 14(b), the following is proposed:

In determining whether a particular invasion of privacy is, in the circumstances, warranted, the following factors, among others, may be considered:

- a. whether the information is necessary for the purpose of subjecting the activities of the province and its agencies to public scrutiny;
  - b. whether access to the information sought may promote public health and safety;
  - c. whether accesss to the information sought will promote informed choice in the purchase of goods and services;
  - d. whether the requested information is relevant to a fair determination of rights affecting the requester;
  - e. whether the record subject will be exposed unfairly to substantial harm, pecuniary or otherwise;
  - f. whether the information is of a highly sensitive personal nature;
  - g. whether the information is unlikely to be accurate or reliable;
  - h. whether the information has been supplied by the data subject in confidence.
17. With respect to item 14(c), the following is proposed:

In the absence of a substantial interest in public access, disclosure will be presumed to constitute a clearly unwarranted invasion of personal privacy in personal records:

- a. relating to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, other than information confirming an individual's presence in a health care facility;
- b. compiled and identifiable as part of an investigation into a possible violation of criminal law except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- c. relating to eligibility for social service or welfare benefits or to the determination of benefit levels;
- d. relating to employment history, other than an individual's acts as a government employee or officer and the fact of government employment, including the position held and the level of compensation;

- e. obtained on an income or similar tax return or gathered by an agency for the purpose of administering an income or similar tax;
- f. describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- g. which are personal recommendations or evaluations, character references or personnel evaluations;
- h. indicating racial or ethnic origin or religious or political beliefs and associations; or
- i. required to be kept confidential by law.

#### SOLICITOR-CLIENT PRIVILEGE

- 18. We recommend the adoption of an exemption based on the doctrine of solicitor-client privilege in the following terms:
  - a. a document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which a provincial governmental institution is or may be a party, on the ground of legal professional privilege.
  - b. a document of the kind referred to in item 18(a) is not an exempt document if it is used by governmental institutions as a source of "internal law," that is to say, as a source of guidance or policy for the making of decisions concerning individuals.

## CHAPTER 14 NOTES

- 1 U.S. Freedom of Information Act, 5 U.S.C. 552 (1976), s. (b)(4).
- 2 Bill C-15, 31st Parliament, 28 Elizabeth II, 1979 (first reading October 24, 1979) s. 20(1).
- 3 See M.L. Freidland, National Security: The Legal Dimensions (Ottawa: Minister of Supply and Services, 1980) 1-3. This study was prepared for the Commission of Inquiry Concerning Certain Activities of the RCMP (the McDonald Commission).
- 4 Ibid., 5-53.
- 5 Fifth Report of the Standing Joint Committee on Regulations and Other Statutory Instruments, Report on Green Paper on Legislation on Public Access to Government Documents, June 28, 1978.
- 6 Bill C-15, s. 15.
- 7 See, Australia, Freedom of Information Bill 1978: Explanatory Memorandum (Canberra: Australian Government Publishing Service, 1978). In reviewing the bill, the Australian Senate Standing Committee recommended that the breach of confidence exemption be deleted.
- 8 See generally, John Eichmanis, Freedom of Information and the Policy-Making Process in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 13, 1980) 143-49.
- 9 Australian Freedom of Information Bill 1978, s. 24(4).
- 10 Bill C-15, s. 21(1)(f).
- 11 See Chapter 8 of this report.
- 12 See ante, Chapter 5; and see generally, K. Kernaghan, Freedom of Information and Ministerial Responsibility (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 2, 1978).
- 13 Australian Freedom of Information Bill 1978, s. 26(1).
- 14 Senate Standing Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978, (Canberra: Australian

Government Publishing Service, 1979), 213-223; cited hereafter as Senate Report.

15 Bill C-15, s. 22(1).

16 A press release issued at the time of the bill's introduction indicated that material such as program evaluations and assessments, test reports, environmental impact statements, testing results, technical and scientific research results, results of field research, feasibility studies, cost figures and estimates, field reports, reports on operations, documents containing information relating to the administration of acts and of programs, and related materials would not be exempt under the proposed bill.

17 See Chapter 12, Section B of this report for a detailed discussion of internal law.

18 Report of the Royal Commission on Australian Government Administration (Canberra: Australian Government Publishing Service, 1976) Appendix, Volume Two, hereafter cited as MRB.

19 Freedom of Information in Canada: A Model Bill (Ottawa: Canadian Bar Association, 1979), hereafter cited as CBA Model Bill.

20 Freedom of Information Bill 1978, s. 27.

21 Commission of Inquiry Concerning Certain Activities of the RCMP, First Report, Security and Information (Ottawa: Minister of Supply and Services, 1980) hereafter cited as McDonald Report.

22 MRB, s. 35(2)(3). See also CBA Model Bill, 24(2)(e).

23 MRB, s. 35(2)(3) and (d). See also CBA Model Bill, s. 24(2)(c) and (d).

24 MRB, s. 35(1); CBA Model Bill s. 24(1)(b).

25 Freedom of Information Bill 1978, s. 27(c).

26 Ibid., s. 27(d).

27 MRB, s. 35(2); FOIA, s. (b)(7).

28 Senate Report, 227-29.

29 s. 16(b) and (c).

- 30      McDonald Report, 49; see also Bill C-15, s. 10.
- 31      McDonald Report, 55.
- 32      See Peter Hogg, Constitutional Law of Canada (Toronto: Carswell, 1977) 181-95.
- 33      At present, offices are maintained in London, Paris, Frankfurt, Tokyo, Atlanta, Chicago, Dallas, New York and Los Angeles.
- 34      Freedom of Information Bill 1978, s. 23(1)(b).
- 35      The Ambulance Act, R.S.O. 1970, c. 20, s. 18(3) as amended by S.O. 1971, Vol. 2, c. 50, s. 5(10).
- 36      S.O. 1973, c. 47.
- 37      Ibid., s. 8(1).
- 38      Ibid., s. 8(4).
- 39      S.O. 1975, c. 69.
- 40      Ibid., s. 31.
- 41      CBA Model Bill, s. 27.
- 42      Administrator of FAA v. Robertson (1975) 422 U.S. 255.
- 43      S. (b)(3).
- 44      Bill C-15, s. 25. The effect of the provision is rendered somewhat obscure by the use of the phrase "shall refuse to disclose" with reference to records covered by discretionary withholding provisions.
- 45      See, for example, Sterling Drug v. F.T.C. (1971), 450 F 2d 698 (D.C. Cir.).
- 46      Numerous illustrations of this kind can be drawn from the U.S. case law. See generally, J.T. O'Reilly, Federal Disclosure Law (McGraw-Hill, 1978) Chapter 14.
- 47      S. 20(1).
- 48      MRB, s. 32(2)d.
- 49      CBA Model Bill, s. 26.

- 50 Bill C-15, s. 20(2).
- 51 Consumer's Union v. V.A. (1969), 301 F. Supp. 796 (SDNY) app. dism'd, (1971), 430 F. 2d 1363 (2d Cir.).
- 52 National Parks and Conservation Association v. Morton (1974), 498 F. 2d 765, 767 (D.C. Cir.).
- 53 Bill C-15, s. 20(1)(a).
- 54 See, for example, "Project: Government Information and the Rights of Citizens" (1975) 73 Michigan L. Rev. 971 at 1061-69. The authors suggest that situations in which confidentiality must be assured should be the subject of explicit provisions in the statute pursuant to which the information is collected. See also MRB, 132.
- 55 I.A. Litvak, Information Access and Crown Corporations (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 14, 1980) 42-44.
- 56 See, for example, Consumer's Union v. V.A. (1969); and Grumman Aircraft Engineering Corp. v. Renegotiation Board (1970), 425 F. 2d 578, 582.
- 57 MRB, s. 36(f).
- 58 Bill C-15, s. 23.
- 59 See Volume 3, Chapter 33, Section E.
- 60 See Chapter 7, Section A; and Section H of this chapter.
- 61 See Section H of this chapter.
- 62 See, generally, C.M. Marwick, ed., Litigation Under the Amended Federal Freedom of Information Act, 4th ed. (Washington: Project on National Security and Civil Liberties of the American Civil Liberties Union Foundation, 1978); "Project: Government Information and the Rights of Citizens" (1975), 73 Mich. L. Rev. (1971); M. Hulett, "Privacy in the Freedom of Information Act" (1975) 27 Admin. L. Rev. 275, cited hereafter as Hulett.
- 63 Rural Housing Alliance v. Dept. of Agriculture, 498 F. 2d 73 at 77 (D.C. Cir. 1974).
- 64 See Department of the Air Force v. Rose, 48 L. ed. 2d 11 (1976). Another court has suggested that this phrase

instructs the court to "tilt the balance in favour of disclosure." See Getman v. NLRB, 450 F. 2d 670 (A.C. Cir., 1971).

65 See Getman v. NLRB, and Robinson, "The Plain Meaning of the Freedom of Information Act: NLRB v. Getman" (1972), 47 Ind. L.J. 530.

66 Winehobby USA Inc. v. IRS, 502 F. 2d 133 (3d Cir., 1974).

67 Robles v. ERA, 484 F. 2d 843, 846 (4th Cir., 1973).

68 See Hulett; and see D.M. O'Brien, "Privacy and the Rights of Access: Purposes and Paradoxes of Information Control" (1978), 30 Admin. L. Rev. 45.

69 Brief No. 92.

70 See Volume 3, Chapter 33, Section E of our report.

71 See T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979) 102-7.

72 Privacy Protection Study Commission, Personal Privacy in an Information Society, Appendix 4, 160-62 (Washington: USGPO, 1977) 160-62.

73 D.H. Flaherty, Research and Statistical Uses of Ontario Government Personal Data (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 5, 1979).

74 See generally, J. Sopinka and S. Lederman, The Law of Evidence in Civil Cases (Toronto: Butterworths, 1974) 157-83.

75 Ibid., 158.

76 Australian Freedom of Information Bill 1978, s. 31.



## CHAPTER 15

### The Review Process

One of the more controversial subjects relating to the design of freedom of information schemes is the establishment of appropriate mechanisms for reviewing decisions taken by governmental institutions in response to applications for information. A decision may take the form of an outright denial on the basis that the information requested falls within an exemption; or, the agency may delay its response, refuse access to a document in a certain form, or refuse to grant a fee waiver. In situations of this kind, the individual whose request has been denied or otherwise prejudicially affected is not likely to view the institution in question as a disinterested party in the matter.

In order to ensure public confidence in the fairness with which such determinations are made, some form of review or appeal is desirable. Review mechanisms encourage uniformity in interpretation of the statutory provisions; if there is one final authoritative source of interpretation, all institutions covered by the statute would be required to conform to it. In the absence of review mechanisms of some kind, disparate practices in responding to freedom of information requests are likely to develop. Sentiment favouring the establishment of effective mechanisms for reviewing access decisions was frequently expressed in briefs presented to this Commission.

There is much less agreement, however, on the precise form that such review mechanisms should take. There are many different ways of designing the provision. First, it would be possible to require that disputed cases be resolved in the Legislative Assembly. Aggrieved individuals could petition their elected representatives to press claims on their behalf. Second, a public official or body could be assigned the task of conciliating disputes between requesters and agencies. The powers assigned to the officials or body could be advisory only, or could include the authority to make appropriate orders (for example, release of the document in question). If the powers were advisory, the official's function would be similar to that of the Ombudsman of Ontario. In response to the complaint, investigation could be undertaken, documents could be inspected in camera, and an attempt at conciliation could be made. In the event of a failure to successfully resolve the dispute, a report containing recommendations (which would not be binding on the government) could be published. These are the typical methods of dispute resolution

conferred on the ombudsmen in various jurisdictions, including Ontario. Third, individuals who had been denied access could be accorded a right of direct appeal to the courts. The courts would have the power to make such orders as necessary to ensure compliance with the act and, in particular, could order the disclosure of a disputed document found not to fall within an exempt category.

As our discussion of developments in other jurisdictions has shown, similar kinds of choices are reflected in the review mechanisms adopted elsewhere. In the United States, the federal Freedom of Information Act and many of the state-level open records laws provide for judicial review of denials. The mechanism of judicial review was also recommended in the federal Canadian proposed legislation, Bill C-15. In New Brunswick, aggrieved requesters can pursue relief either through the office of the ombudsman or through an appeal to the courts. Similarly, in Sweden, individuals denied access may either seek the assistance of the ombudsman or pursue relief in the administrative courts. Both the Australian federal bill and the Minority Report Bill propose a review by the independent Administrative Appeals Tribunal. Review by the legislature appears to have been adopted only in the Nova Scotia act.

In selecting from this range of possible devices, a number of factors must be considered. First, it is our view that any appeal mechanisms must be perceived by the public as being truly independent of the governmental institution that initially refused to disclose the requested document. Public skepticism concerning the independence of the reviewing mechanism and of the fairness of the review decisions would do much to undermine the effectiveness of a freedom of information scheme. We believe that the reviewing mechanism should be able to require release of documents to the public and make other appropriate orders. Although it may be true that the advice rendered by an advisory body would be followed by governmental institutions, the occurrence of even rare instances in which such advice was not followed could substantially lessen the perceived effectiveness of the scheme.

Another important feature of the review process is its accessibility. An effective means of appeal should be afforded to individuals regardless of their geographical location within the province, their financial means and their sophistication in matters of legal procedure. This suggests that, in the first instance, at least, the review body should be unencumbered by expensive or complicated procedural barriers to the initiation or processing of a request for a review of the initial decision.

In many situations, the timeliness of access will be important to the individual. Accordingly, it would be desirable to implement appeal mechanisms capable of responding with a minimum of delay to a request for review.

Finally, the reviewing mechanism must permit ultimate resort to a decision-making body of such stature that all interested parties, members of the public, public servants and politicians -- whether they be members of the government of the day or the opposition -- will have confidence in the wisdom of decisions made. This consideration suggests that it would be desirable to establish reviewing mechanisms so that parties who are unsuccessful at first can obtain a reconsideration of the matter at a further stage of review. (In the first instance the matter should be considered by a trained information officer who should know and understand the purposes of the act.)

Our conclusion is that the review process should be assumed by decision-making bodies established for that purpose rather than by the judicial system. Aggrieved individuals should be entitled to launch an appeal to a public official who could respond expeditiously and effectively to a request for intervention. This official, whom we will call the Director of Fair Information Practices, should be empowered to make appropriate investigations of the circumstances surrounding a denial with a view to seeking a resolution of the dispute acceptable to both parties. In the event that an agency is unwilling to follow the recommendation of the director, the director should be empowered to make an appropriate order. It is essential, in our view, that the director be permitted considerable latitude in devising flexible procedures and methods of investigation and conciliation in responding to requests for review. Proceedings at this level of review should not be subject to the strict provisions of The Statutory Powers Procedure Act[1]. The director should be able to act on the basis of requests communicated to him either orally or in writing, and should not be required in every case to convene a hearing for the presentation of evidence from both parties. He should be able to entertain written or oral submissions from any interested party, and be free to conduct such investigations as he deems appropriate. He should be granted a statutory right of access to all government documents so as to ensure that he will be able to reach an independent view of the exempt or non-exempt status of the document in question.

As will be indicated in subsequent chapters of this report, we propose to assign additional roles to the Director of Fair Information Practices in assisting in the implementation and monitoring of the freedom of information scheme. As well, we make recommendations with respect to the functions to be performed by

the director in the administration of our proposed individual privacy protection scheme.

We anticipate that expeditious consideration of disputed cases by the Director of Fair Information Practices would lead to satisfactory resolution of the vast majority of disputes. We hope that the responsibility of this office would be assumed by an individual of such stature that efforts at conciliation would normally result in a resolution of the conflict acceptable to both parties. Nonetheless, we believe that it is realistic to assume that in many cases, one of the parties will wish to seek further review of the matter. For this purpose, we favour the establishment of the Fair Information Practices Tribunal. This tribunal would entertain appeals from decisions of the director taken either by the government or by the individual who has been denied access to a document. At this level, we envisage a more formal proceeding, substantially in accordance with the requirements of The Statutory Powers Procedure Act. The tribunal should have the capacity to compel the production of documents and should be permitted to examine such documents in the absence of either party. In situations where the government could not fairly present its reasons for withholding a document in the presence of the applicant, the tribunal should be permitted to entertain submissions from the government in the absence of the applicant.

The appointment process respecting the director and the members of the tribunal should reflect their independent status. Appointments should be made by the Lieutenant Governor in Council. Such appointments should enjoy security of tenure for a period of years, provided that the director or a member of the tribunal may be dismissed for cause.

In the normal course of events, it may be anticipated that a decision of the Fair Information Practices Tribunal would be accepted by the parties as a final resolution of their dispute. Nonetheless, as with other administrative tribunals subject to the laws of Ontario, judicial review of decisions of the tribunal would be possible pursuant to the provisions of The Judicial Review Procedure Act[2]. In essence, this would mean that judicial review would be available in any case where the tribunal failed to follow proper procedures, exceeded the jurisdiction conferred upon it by statute, or erred in law.

In all proceedings relating to the withholding of documents by governmental institutions, the burden of persuading the adjudicator that the document is exempt under the legislation should fall on the institution. The imposition of a burden on the requester to prove that the document, which he has not seen, is not exempt would erect a barrier to the exercise of access rights

under the statute. For this reason, freedom of information legislation is normally interpreted to impose the burden of persuasion on government. The federal Australian and Canadian bills expressly so provide. The Australian provision is expressed in the following terms:

In proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the tribunal should give a decision adverse to the applicant[3].

We recommend the adoption of a similar provision in our proposed freedom of information scheme.

#### RECOMMENDATIONS

1. A public official, the Director of Fair Information Practices, and a tribunal, the Fair Information Practices Tribunal, should be established for the purpose of performing certain functions, further explained below, with respect to the resolution of disputes between governmental institutions and individuals seeking access to government documents.
2. An individual who has made a request and feels aggrieved by any decision made with respect to the request by the governmental institution in question may seek a review of the decision by the Director of Fair Information Practices.
3. The director should be empowered to investigate the circumstances of the dispute, seek a reconciliation of the differences between the parties, and in the event that the dispute cannot be satisfactorily resolved, make an appropriate order with respect to the matter after giving both parties an opportunity to make representations. Proceedings before the director should not be subject to The Statutory Powers Procedure Act.
4. Either party may seek a further review of the matter in dispute on appeal to the Fair Information Practices Tribunal. The tribunal should conduct a hearing substantially in accord with the provisions of The Statutory Powers Procedure Act and make any appropriate order.
5. Either party to a proceeding before the Fair Information Practices Tribunal should be entitled to seek judicial review pursuant to the provisions of The Judicial Review Procedure Act.

6. The Director of Fair Information Practices and the Fair Information Practices Tribunal should have the power to review disputed documents in camera. The tribunal should be empowered to entertain representations from the governmental institution in the absence of the applicant where this is necessary to facilitate a full explanation of the reasons for non-disclosure of the document.
7. The Director of Fair Information Practices and the members of the Fair Information Practices Tribunal should be appointed by the Lieutenant Governor in Council with security of tenure for a period of years, provided that either the director or any member of the tribunal may be dismissed for cause.
8. In proceedings with respect to decisions taken by governmental institutions in response to requests for documents, the institution to which the request was made should have the onus of establishing that the decision was justified.

CHAPTER 15 NOTES

1 S.O. 1971, Vol. 2, c. 47.

2 S.O. 1971, Vol. 2, c. 48, am. S.O. 1976, c. 45.

3 Freedom of Information Bill 1978, s. 41.



## CHAPTER 16

# Protecting the Rights of Submitters of Information and Data Subjects

In the preceding chapter, we outlined our proposals with respect to the mechanisms of review and appeal to be established under the proposed freedom of information law. Those proposals ensure that an individual who has been denied access to government documents by a public servant may obtain an independent review of the matter by an authority having the power to order disclosure of the requested document. In this chapter, we will consider the establishment of procedural safeguards to protect the interests of two other categories of parties who may be affected by decisions to disclose documents: submitters of information and data subjects.

"Submitters of information" refers to individuals or corporations who have provided valuable commercial information to governmental institutions. "Data subjects" refers to individuals who are the subject of personal information contained in government documents. Both submitters of information and data subjects may, in certain instances, feel that they should be consulted before a decision is taken to disclose information supplied by them or concerning them.

The establishment of procedural safeguards to protect the interests of submitters of information and data subjects raises a number of perplexing issues. Should such parties invariably be given notice that a disclosure is proposed? If they are to be given notice, are they also to be granted a right to be heard or to make representations before the disclosure is made? Should they be granted a right to preclude disclosure by obtaining an order prohibiting disclosure from some independent reviewing authority? Further, if independent review is appropriate, is it also appropriate that the full mechanism of the review process be placed at their disposal? In particular, should there be a right to ultimate judicial review of decisions to disclose based on an error of law?

There are further complications. Are the interests of data subjects entitled to the same recognition as those of submitters of information? Is the claim of a business corporation that information submitted by it should not be disclosed to the public entitled to the same recognition as the claim of an individual who protests that the disclosure of information about him will constitute an unwarranted invasion of his privacy?

As with so many other problems addressed in the course of our inquiry, the complexities of these issues do not yield to a simple answer. It is possible, however, to identify a range of possible solutions with relative ease. At one extreme, it is possible simply to accord no recognition to the interests of data subjects and submitters of information in the proposed legislation. This, indeed, is the solution which has been adopted in the U.S. Freedom of Information Act. It may be that the U.S. legislation has adopted this approach more by inadvertence than by design. Nonetheless, as we have indicated in our discussion of the U.S. experience, courts have resisted the suggestion that some tacit recognition of the interests of these parties should be read into the U.S. act. Numerous lawsuits have been advanced seeking to enjoin disclosure of documents. Most of these actions, commonly referred to as "reverse freedom of information" cases, were brought by business concerns wishing to prevent disclosure of information submitted by them to government which they maintained was exempt from disclosure by virtue of the exemption pertaining to commercial and financial information.

Although some U.S. courts had concluded that the Freedom of Information Act should be interpreted so as to grant an implied right to submitters to enjoin disclosure of exempt information, this view has recently been rejected by the Supreme Court. The court drew support from what it viewed as the underlying philosophy of the statute, which it characterized in the following terms:

The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision making. Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information in government files has been submitted by private entities seeking government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude in certain circumstances to afford the confidentiality desired by these submitters. But the Congressional concern was with the agency's need or preference for confidentiality. The FOIA itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information[1].

The court also placed emphasis on the "permissive" nature of the commercial information exemption. By adopting exemptions that permit rather than require withholding of documents, the act has, in essence, conferred a discretion on government agencies to disclose information exempt under the statute. Accordingly, only

those interests of the submitter of information that the agency in question decides to recognize will be protected under the U.S. act. Although it may be that a decision to disclose exempt information could be reviewed by the courts as an "abuse of discretion" under certain principles of U.S. administrative law[2], the substance of the matter is that the decision to disclose exempt information is one which can be made by the agency without reference to the wishes or representations of the party who submitted the information. As one might expect, however, U.S. federal agencies have generally adopted the practice of consulting with submitters of information in cases where it is felt that the disclosure may be a sensitive one.

At the opposite end of the spectrum of possible solutions would be a scheme giving a legal right to submitters and data subjects to enjoin disclosure through various review mechanisms and ultimately to appeal such matters to the courts. Attendant duties of notice and consultation could be imposed upon governmental institutions contemplating a disclosure of information concerning these parties. Such a scheme could be effected in our own proposals by making the exemptions relating to commercial and personal information "mandatory" rather than "permissive," and by further providing that the institutions must give notice of disclosure of information that might fall under either of these exemptions. (For convenience, we will refer to this as the "full legal rights" solution.) Although we are not aware of any jurisdiction in which this approach has been adopted, it is obviously a mechanism whereby maximum protection would be afforded to submitters and data subjects.

Other solutions are also possible. It might be desirable to accord submitters and data subjects only the right to protest or make representations with respect to proposed disclosures, either to the institution itself or to the administrative appeal mechanisms (the Director of Fair Information Practices and the Fair Information Practices Tribunal); these parties would not be granted the further legal right of enjoining disclosure and being able to seek ultimate judicial review. In other words, parties could be granted a "right to be heard," but not a right to forbid disclosure. This approach could be included in our proposed scheme by retaining the "permissive" nature of the exemptions but enabling the director or the tribunal to substitute its own discretion in the matter if the submitter or data subject seeks review of the decision by the director or, on appeal, by the tribunal.

There is another possible solution with respect to the question of notice. Many documents that are clearly not exempt from the rule securing public access will contain information

relating to submitters and data subjects. In such cases, it would be pointless to insist on notice being given to such parties. A more practicable solution would be to confer a discretion on governmental institutions to notify such parties in cases where the institution has come to the view that substantial interests affecting such parties are involved in disclosing a requested document. Because it may seem unfair to allow the matter of participation in the decision-making process to reside solely in the discretion of the institution, it would be possible to further allow interested parties to come forward on their own initiative and intervene in the decision-making process, whether at the level of the institution, the director, or the tribunal, in order to make representations as to why the disclosure should not be made.

What we will refer to as the "intermediate solution" involves the combination of these four devices -- "permissive" exemptions, rights to seek review at the level of the tribunal, agency discretion to give notice to parties having a substantial interest, and the right of interested parties to intervene in proceedings even though they have not been given notice by the institution.

We are not aware of any jurisdiction that has adopted this intermediate solution to the problems of submitters and data subjects, although an approach along these lines has been suggested in the Australian Minority Report Bill[3]. The provisions of the bill facilitate involvement of submitters once a decision to refuse disclosure has been made by the governmental institution and the disappointed requester has taken an appeal of that decision to the Administrative Appeals Tribunal. In such circumstances, the government may exercise a discretion to notify the submitter that such an appeal has been taken so as to afford him an opportunity to present his concerns to the tribunal. Alternatively, regardless of whether the submitter has received notice of an appeal from the government, he may directly petition the tribunal for permission to become a party in the appeal proceedings. The exemptions which may form the subject matter of these disputes are both permissive. Accordingly, the tribunal will be reviewing the exercise of agency discretion to disclose and it is most unlikely that any appeal beyond the tribunal level would be possible. Similar proposals have been advanced by the Canadian Bar Association in its model bill, although the bill's provisions extend these procedural safeguards both to submitters and to data subjects[4].

We now turn to our own recommendations. It will be useful to distinguish between the cases in which disclosure of commercial information is sought and those in which the disclosure constitutes a potential invasion of personal privacy. With respect to commercial information, we have rejected the extreme solutions.

Although the full legal rights solution appears to accord absolute fairness to submitters, it is our view that adoption of this solution would seriously undermine the effectiveness of our proposals. First, the prospect of agencies being required to serve notice on all submitters in the event of requests for information concerning them raises the prospect of needlessly expensive and burdensome requirements being imposed on government agencies. A particular request may involve information concerning a substantial number of such parties, and it may well be the case that the information requested is not in the least sensitive. Further, the granting of full rights of appeal through to ultimate judicial review presents the prospect of creating barriers of considerable expense and delay in the path of requesters seeking information whose disclosure is contested by a submitter. In the case of commercial or financial information, the resources of the submitter may be wholly disproportionate to the resources that a typical requester could marshal in a contest of this kind. Pursuit of appeal rights to their ultimate conclusion by submitters might effectively preclude the requester from exercising rights conferred under the legislation.

The U.S. approach of according no rights to submitters has the obvious merit of avoiding these difficulties and this, indeed, may explain the fact that both the federal Australian and the federal Canadian proposals do not contain notice or appeal rights for these parties.

There are a number of reasons, however, for adopting some form of recognition of interests of submitters who wish to protest the disclosure of information which they view as having commercial value. First, the governmental institution may not have the requisite knowledge to fully appreciate the implications of disclosure for the party concerned. In a particular case it may be that a relatively sophisticated understanding of the commercial party's business operations or the markets in which it operates would be necessary to assess whether competitive harm is likely to result from disclosure. Second, in many cases, the institution may be a disinterested party with respect to the disclosure issue. Where this is so, the institution will have less incentive to oppose disclosure and prevent injurious consequences than would the submitter. Third, the exemption pertaining to commercial information that we have recommended provides that potentially valuable information may be disclosed where there is an overriding public interest in so doing. We expect that commercial parties would feel keenly that they should have an opportunity to make representations with respect to the striking of this balance in a particular case.

We believe that a satisfactory mechanism for recognizing the interests of parties who might oppose disclosure of commercially valuable information would be to adopt an intermediate solution of the kind proposed in the Australian Minority Report Bill. Hence, we favour the adoption of provisions that would allow submitters of commercial information to participate in the deliberations relating to a proposed disclosure. It is our view that the institution should be permitted to involve the commercial party at the initial stage of decision making. For this reason, we recommended in an earlier chapter that the period of time during which a response to a request must be made by a governmental institution could be extended when the institution wishes to consult with an interested party. In any case where the responsible official believes that a substantial interest of a submitter may be involved in a disclosure, the institution should be required to notify parties and entertain representations relating to the proposed disclosure. In cases where the institution has refused to disclose a requested document and an appeal has been taken from this decision by the requester, the institution should be granted a discretion to notify submitters with respect to the appeal. Commercial parties who have not received such notice should nonetheless be entitled to come forward and make representations at any stage in the decision-making process. In particular, they should be permitted to petition to be made parties to proceedings before the Fair Information Practices Tribunal. In this way, commercial parties would, in effect, be granted a "right to be heard" or "right to make representations" in situations where potentially harmful disclosure is contemplated.

It is not our view, however, that submitters of commercial information should be entitled to enjoin governmental institutions from disclosing documents. We favour the retention of the "permissive" character of the exemption pertaining to commercial information. Thus, the government would retain a discretion to disclose exempt information. An exercise of this discretion in favour of disclosure could be reviewed, however, at the instance of the commercial party, by the Director of Fair Information Practices, or by the Fair Information Practices Tribunal. The discretionary character of the decision to disclose would ensure, however, that further review of the merits of the decision through the judicial system would not be available to the commercial party[5]. Our recommendations will provide for two stages of independent review by the director and the tribunal in order to afford adequate safeguards of the interests of submitters. At the same time, we wish to avoid the problems of expense and delay involved in the choice of the "full legal rights" approach to this problem.

We take a different view with respect to the level of protection to be afforded to the interests of individuals who are concerned that the disclosure of a particular document will constitute an invasion of their personal privacy. We have concluded that the ability of an individual to exercise some control over the disclosure of government-held information pertaining to him is an essential condition for the preservation of important privacy values. Accordingly, we will recommend in a subsequent chapter of this report that personal information which is exempt from the general rule requiring disclosure under the freedom of information law should not be disclosed by governmental institutions except in certain exceptional circumstances which we will there describe. In short, the personal privacy exemption is to be "mandatory" rather than permissive, with the result that the "full legal rights" resolution is favoured by this Commission with respect to personal information concerning data subjects.

Again, however, we do not favour the adoption of provisions which would require governmental institutions to give notice to all data subjects where a disclosure of personal information is proposed. There may be situations where the disclosure is quite uncontentious and where the number of individuals to be contacted would impose unreasonable administrative burdens on the institution. Accordingly, we recommend that governmental institutions be required to notify these parties only when the institution feels that a requested disclosure raises serious questions of privacy invasion. Further, individuals who have not received such notice but who have become aware that a disclosure is proposed should be entitled to come forward and intervene at any stage of the decision-making or appeal processes.

It is of interest to note that the disparate treatment we propose to accord to identifiable personal information is also reflected in the federal U.S. experience. Although the personal privacy exemption under the U.S. FOIA is permissive in nature, provisions of the U.S. Privacy Act of 1974 (which are similar in nature to our recommendations on this subject) enable the individual to enjoin the disclosure of personal information pertaining to him which is exempt from the general rule of access under the FOIA[6].

#### RECOMMENDATIONS

1. In any case where a governmental institution is of the view that a proposed disclosure may have a substantial impact on the interests of a submitter or data subject, the institution

shall so notify the submitter or data subject and shall entertain representations relating to the proposed disclosure.

2. In a case where a governmental institution has decided to deny a request for a document containing information pertaining to either a submitter or a data subject, and an appeal from this decision has been made by the requester, the institution should be permitted to so notify the submitter or data subject.
3. Regardless of whether notices of the kind suggested above have been served by a governmental institution on a submitter or data subject, such parties should be entitled to make representations to the institution with respect to proposed disclosures of which they have become aware. Further, submitters or data subjects should be entitled to participate in proceedings in the nature of review or appeal.
4. Where the document in question contains information that may be exempt under the commercial information exemption, submitters should be entitled to obtain an independent review of a decision to disclose by the Director of Fair Information Practices and the Fair Information Practices Tribunal. On review, the director or the tribunal should be entitled to substitute his or its discretion for that of the institution in deciding that the document should not be disclosed. Inasmuch as the commercial information exemption is to remain "permissive," however, the decision to disclose will remain discretionary in character. Accordingly, further review on the merits, beyond the level of the tribunal, would not be available to parties protesting the disclosure of commercial information.
5. Where the document in question contains personal information, data subjects should be entitled to obtain an independent review of a decision to disclose by the Director of Fair Information Practices or the Fair Information Practices Tribunal. As the privacy exemption is "mandatory," the director or the tribunal will, if of the opinion that the document is exempt, order that it not be disclosed. Further review of a decision to disclose would be possible to the extent that the tribunal has erred in law or otherwise created grounds for review under the Judicial Review Procedure Act.

## CHAPTER 16 NOTES

- 1      Chrysler Corp. v. Brown (1979), 441 U.S. 281 at 288-89.
- 2      For a concise account of the powers of U.S. courts to review the exercise of discretionary powers, see B. Schwartz, Administrative Law (Boston, Toronto: Little, Brown, 1976) 451-54.
- 3      Report of the Royal Commission on Australian Government Administration, Appendix Two (Canberra: Australian Government Publishing Service, 1976) s. 17 and s. 50.
- 4      Freedom of Information in Canada: A Model Bill (Ottawa: Canadian Bar Association, 1979) ss. 6(4) and 18(1). It is not clear, however, whether the Model Bill adopts the "full legal rights" solution with respect to rights of appeal. The commercial information and personal privacy exemptions are both permissive, yet the bill provides for judicial review at the instance of submitters and data subjects.
- 5      For a discussion of the extent to which the courts may review the exercise of discretionary powers, see D. Mullan, Administrative Law: Title 3, Vol. 1, C.E.D., 3d. ed. (Toronto: Carswell, 1979), s. 114.
- 6      See Volume 3, Chapter 29, Section E of this report.



## CHAPTER 17

# Administration of The Act

The enactment of a freedom of information scheme would effect a profound alteration in governmental information policy. Although, as we have indicated, there does not exist in the government of Ontario at present an authoritative source of guidance on the types of information which ought to be disclosed to the public, interviews conducted by our research staff indicate that two broad principles are commonly observed in practice. First, public servants are reluctant to disclose information to the public unless they have been authorized to do so by a superior. Second, decisions to disclose are often premised on a judgment as to whether or not the individual requesting information has a "need to know." The enactment of a freedom of information law effects a reversal of these principles by stipulating that a member of the public is presumed to be entitled to access to a document unless it can be shown that the document falls within the exempt category, and by establishing that the individual making the request is not required to prove a need for the information. Successful implementation of so important a change in governmental information policy can be achieved, we believe, only if suitable mechanisms are set in place to supervise the administration of the act's provisions. In this chapter, we make recommendations with respect to three matters: the education and training of public servants in the operation of the legislation, the establishment of internal decision-making processes, and reporting requirements.

It is not our intention to make detailed recommendations with respect to these matters. We will, however, suggest what we envisage as an appropriate implementation strategy; in particular, we will suggest that certain administrative responsibilities be assumed by a specific administrative officer in each governmental institution subject to the provisions of the act, and that a general supervisory role be assumed by the Director of Fair Information Practices.

### A. EDUCATION AND TRAINING

Our proposed freedom of information legislation contains what we believe to be satisfactory mechanisms for the adjudication of disputes arising from the denial of an individual's request for access to a government document. An individual whose request has

been denied can, if he is persistent enough to pursue appeal remedies, ultimately secure an objective and independent determination of the application of the statutory right of access to the document in question. In a properly functioning freedom of information scheme the need to resort to such remedies should be a rare occurrence. Ideally, the provisions of the act should be fairly and consistently applied by all public servants, at every level.

To achieve this objective, extensive educational programs relating to the freedom of information scheme and its application to the information holdings of each governmental institution should be undertaken. We believe it to be important, however, that there be a source of consistent guidance with respect to the proper interpretation of the act to whom those involved in programs of this kind could turn for advice. It is our recommendation that this function be performed by the Director of Fair Information Practices. As we have indicated previously, the director will play an important role in the resolution of disputes arising under the legislation. It would be an undesirable and wasteful exercise to engage in extensive training programs advising public servants to act on the basis of interpretations that vary substantially from the director's view. The participation of the director in the design and implementation of training programs established for public servants would produce a desirable measure of uniformity in response to information access requests throughout the various ministries and other institutions subject to the proposed legislation.

#### B. INTERNAL DECISION-MAKING PROCESSES

A number of the freedom of information schemes in other jurisdictions specifically provide for the establishment of decision-making processes within governmental institutions. Typically, statutory requirements stipulate either that some form of internal appeal process within the institution must be adopted or that decisions to deny access may only be taken by a particular public official. The Nova Scotia Freedom of Information Act, for example, provides that written requests for information access under the act should be directed to the deputy head of the department where the information is kept. If the request is denied, the individual making the request must be informed that he may appeal the denial to the appropriate minister. The minister, in turn, is required to respond to the request within thirty days[1]. The New Brunswick legislation provides that individuals who wish to exercise rights under the act should forward requests for the documents in question to the appropriate minister; and it is the minister who must advise the applicant of a decision to deny access to the document[2]. The U.S. statute and the federal

Australian proposals do not require a specific public official to make all denial decisions, but do provide for internal review by the head or principal officer of the agency in question[3].

Provisions of this kind attempt to accomplish a number of worthwhile objectives. First, it is obviously desirable to locate responsibility for decisions denying access at a senior level so as to ensure that consistent interpretations of the legislation are applied within the institution. Second, requiring internal review by a particular official ensures that a high degree of expertise in the application of the legislation will be brought to bear on the decision. Third, mechanisms for internal review ensure that decisions with respect to requests are ultimately taken by officials who are not engaged in direct program service delivery to the public and who therefore may weigh more dispassionately the claims of an applicant who is engaged in a dispute with personnel at the program administration level. Experience under the U.S. act has shown that a substantial portion of denial decisions taken at first instance are reversed on internal review[4]. Finally, assigning formal responsibilities for decision making to a particular official will enhance the prospects of holding an institution accountable for its standard of compliance with the act.

Although we do not propose to make specific recommendations with respect to the structure of internal decision-making processes, it is our view that some mechanism should be established to ensure that decisions to deny access are made by or under the authority of a specific official to whom this task has been assigned. We suggest that each governmental institution covered by the act should be required to appoint an official (to be called perhaps the Information Policy Officer) to whom the responsibility for making decisions to deny access would normally be assigned. We would not suggest, however, that individuals making requests should be required to direct appeals to the Information Policy Officer as a prerequisite to seeking the intervention of the Director of Fair Information Practices. An individual exercising rights under the act should be able to forward a request to any official of the institution in question and, upon receiving a denial or failing to receive a reply within the requisite period, should be able to request the intervention of the director. The precise structure of decision-making processes may vary from one institution to the next, depending on the size and complexity of the institution and the volume and nature of the requests it is likely to receive.

#### C. REPORTING REQUIREMENTS

We further recommend that the Director and the Tribunal of Fair Information Practices report annually to the Premier and that their reports be tabled in the legislature. The director's report should provide information on the nature of the dispute resolution activities in which he has been engaged over the preceding year; an assessment of the extent to which institutions subject to the act are complying with its provisions; and his recommendations, if any, with respect to improvements which might be made in the practices of particular institutions or with respect to amendments to the freedom of information legislation.

#### D. RECOMMENDATIONS

1. Extensive educational programs for members of the public service should be undertaken with respect to the freedom of information scheme and its application to the information holdings of each governmental institution subject to its provisions. The Director of Fair Information Practices should be involved in the design and implementation of these programs.
2. Each governmental institution subject to the legislation should assign responsibility for the making of decisions to deny access to a particular official (to be called perhaps the Information Policy Officer) and should give consideration to establishing mechanisms for internal review of decisions to deny requests for access to information.
3. The Director and the Tribunal of Fair Information Practices should report annually to the Premier and their reports should be tabled in the legislature. The director's report should contain the following information:
  - a. an indication of the nature and ultimate resolution of complaints brought to him by individuals protesting decisions taken under the act by governmental institutions;
  - b. an assessment of the extent to which governmental institutions are successfully complying with the legislation;
  - c. any recommendations the director may wish to make with respect to the practice of particular institutions or proposed revisions to the legislation.

CHAPTER 17 NOTES

1 S.N.S. 1977, c. 10, ss. 10-12.

2 S.N.B. 1978, c. R-10.3, s. 5.

3 5 U.S.C. 552(a)(6)(A); Australian Freedom of Information Bill 1978, s. 38.

4 A review of statistical summaries prepared by Dr. Harold Relyea of the Congressional Research Service suggests that approximately 15 per cent of such appeals are granted in full and an additional thirty-five per cent are successful in part. See, for example, H.C. Relyea, The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975 (Washington: Congressional Research Service, 1976).



## CHAPTER 18

# Civil and Criminal Liability

In Chapters 15 and 16 of this report, we have set out our recommendations for review procedures to be made available to individuals who are aggrieved by a decision to withhold or disclose information under the provisions of the freedom of information legislation. The effect of these recommendations is to ensure that some form of redress is available to individuals who feel that a decision unfairly prejudices their interests. In this chapter we will consider the question of imposing certain civil and penal sanctions on government personnel for failure to comply with the duties imposed by the proposed legislation. The rationale underlying such sanctions, of course, is to encourage full and successful implementation of the freedom of information scheme.

Two different problem areas are to be addressed. First, as we have indicated elsewhere in this report, there are a significant number of provisions in specific statutes which prohibit public servants from disclosing certain kinds of information to the public[1]. It must be considered, then, whether these secrecy offence provisions should be reconsidered in the light of our proposed freedom of information scheme with a view to their possible repeal. Second, consideration will be given to the question of whether civil or penal sanctions should be imposed on public servants who fail to comply with the provisions of the legislation requiring disclosure of information to the public. By "civil" sanctions we here mean the adoption of some form of sanctioning mechanism (such as disciplinary proceedings) not involving the creation of a criminal or quasi-criminal offence.

### A. EXISTING SECRECY OFFENCES

Many of the more than 120 statutory secrecy provisions identified in a Commission research paper[2] establish an offence of improper disclosure of information. We have two concerns with respect to offence provisions of this kind. First, as we have previously indicated, we are concerned that many of these provisions may be drawn so broadly as to protect government information which could, without harm, be disclosed to the public under our freedom of information proposals. We have previously recommended that these provisions be subject to review, on a case-by-case basis, by a committee of the Legislative Assembly

with a view to recommending their modification or repeal[3]. We anticipate that the effect of this review would be to diminish significantly the extent to which information is shielded by these provisions.

Our second concern relates more specifically to the use of the criminal sanction in creating offences related to disclosure of information. The cumulative effect of these provisions, we fear, may be to undermine the effectiveness of a freedom of information scheme. The existence of a substantial number of secrecy offences throughout the laws of Ontario may sustain an atmosphere in which public servants conclude that the safest course in responding to requests made under the freedom of information act is to deny access and leave the requester to seek review. If attitudes of this kind gained sufficient currency, successful implementation of the scheme would be impaired. Accordingly, we recommend that the legislative review of these statutory secrecy provisions specifically consider whether the offences created with respect to the protected information are necessary in each instance. It may be that in many cases the offence provision could be either repealed or narrowed in its scope. In particular, it may be desirable to establish as a defence to prosecution that the public servant in question was attempting, in good faith, to comply with the provisions of the freedom of information legislation.

#### B. SANCTIONS FOR NON-COMPLIANCE

A number of freedom of information schemes impose civil or penal sanctions on public servants who have disregarded the provisions of the legislation in denying requests for access to information. A majority of state-level freedom of information or open records laws in the U.S. establish offences relating to improper refusal to disclose a document[4]. Many of these require that a violation of the statutory requirements be "willfully and knowingly" committed in order to constitute a criminal offence. The penalties which can be imposed under these provisions typically include a modest fine or a short term of incarceration, roughly equivalent to the penalties imposed under the Ontario secrecy offence provisions referred to above.

Freedom of information laws at the national level typically do not impose penal sanctions of this kind. The U.S. act, however, provides that proceedings should be undertaken in cases of "arbitrary" or "capricious" denial of access in order to determine whether some disciplinary action is warranted:

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends[5].

This provision was included as part of the 1974 amendments to the U.S. act and represented a congressional response to the considerable reluctance of federal agencies to comply with the spirit of the 1966 freedom of information law.

Our own view is that provisions of this kind should not be included in an Ontario freedom of information law. We do not believe that there is any factual basis for reaching a pessimistic conclusion as to the willingness or ability of members of the public service in Ontario to comply with a freedom of information scheme. Further, it is our view that the criminal sanction should not be deployed in the absence of clear evidence of its necessity. The proliferation of criminal offences for the purpose of encouraging individuals to comply with statutory standards is a phenomenon which we view with some misgivings. In any event, we are not persuaded that the imposition of penal sanctions is either necessary or desirable in the present context.

An argument often made in support of the imposition of penal sanctions is that, in the face of sanctions for disclosure, such as the Ontario secrecy offences referred to above, it is necessary to create an offence of non-disclosure in order to ensure that public servants will not simply choose non-disclosure as a matter of course in order to be certain to avoid any risk of penal consequences. Although there is some force in this argument, to give effect to it would place public servants in a very difficult position indeed. A better solution, we believe, is a review of existing secrecy offence provisions to ensure that this device is adopted only where the circumstances clearly warrant its use.

With reference to disciplinary proceedings, we also conclude that measures of the kind set forth in the U.S. act are not necessary. Again, it should be emphasized that the U.S. provisions represent a response to what was viewed by Congress as widespread recalcitrance on the part of agency personnel to comply with the legislation. Whether or not such views accurately assess the manner in which U.S. agencies implemented the scheme, there is no evidence to suggest that similar problems would develop in Ontario. On the contrary, we are confident that Ontario public servants would, as a general rule, comply with both the letter and spirit of a freedom of information law. Existing disciplinary mechanisms are adequate to meet any need that might arise and need not, in our view, be the subject of specific reference in the freedom of information law.

#### C. RECOMMENDATIONS

1. The existing statutory provisions creating offences for disclosure of confidential information by public servants should be reviewed by a committee of the Legislative Assembly with a view to their modification or repeal in appropriate cases.
2. The freedom of information law should not attach penal consequences to the failure of a public servant to comply with the provisions of the act, nor should it include mechanisms for launching disciplinary proceedings in addition to those already in place in the province of Ontario.

CHAPTER 18 NOTES

- 1 See Chapter 7.
- 2 T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979).
- 3 See Chapter 14, Section G.
- 4 See, generally, "Project: Government Information and the Rights of Citizens" (1975) 73 Mich. L. Rev. 971 at 1180-87.
- 5 5 U.S.C. 552(a)(4)(F).



## CHAPTER 19

# Integrating Freedom of Information with The Doctrine of Crown Privilege

In Chapter 7 of this report the legal doctrine of Crown privilege was described. It is this doctrine which constitutes the basis for claims by the government that it cannot be compelled to produce certain documents for the purpose of providing evidence in court. We now return to this subject in order to explore the relationship between Crown privilege and the freedom of information scheme which we recommend.

As a starting point for analysis, it is important to indicate that the Crown privilege doctrine serves objectives different from those served by freedom of information laws. The doctrine of Crown privilege is in effect a code of judge-made rules controlling access to government information by persons who are parties to a lawsuit (litigants). As we have seen, the doctrine is one that appears to be undergoing a process of growth and evolution in recent case law. We have noted, as well, that the doctrine has been the subject of various proposals for reform in recent years. The Crown privilege rules reflect an attempt by the courts to balance the conflicting interests in confidentiality and access that arise when a litigant demands production of government information. A freedom of information statute, on the other hand, is intended as a general code or set of rules regulating access to government information by all individuals, regardless of their personal interest. Such legislation attempts to strike an appropriate balance between the interests favouring openness and those favouring confidentiality or secrecy. The existence of these two different codes serving different purposes, but sharing a common concern with the control of access to government information, raises a series of questions relating to their points of contact and, of course, their potential conflict.

There are three questions which may be addressed:

1. Should the information covered by the doctrine of Crown privilege constitute a further exemption to the general rule of access under the freedom of information scheme?
2. Should the doctrine of Crown privilege continue to govern access to government information in the context of litigation, or should it be abolished, leaving such issues to be resolved under the freedom of information scheme?

3. If Crown privilege is to be preserved, should litigants be restricted to their rights of access under the doctrine of Crown privilege, or should they be permitted to seek access under the freedom of information scheme as well?

In a freedom of information scheme, the general interest in the political accountability of the executive government favours openness. Thus, the statutory right of access is typically available to anyone, regardless of personal motive or interest. The statutory exemptions reflect the various interests favouring secrecy (for example, personal privacy of individuals, effective policy making, effective law enforcement) to which the general right of access is subordinated. The release of documents and information within the scope of those exemptions is usually left to the discretion of the government (that is, the exemptions are "permissive"). All of these features are present in the scheme which we have recommended.

Quite different interests underlie the claim for disclosure when a government document is sought in the context of litigation. The numerous cases concerning Crown privilege invariably invoke the public interest in the proper administration of justice as the basis for access. It is argued that the proper administration of justice is fostered by due consideration of all information that may be relevant to a determination of the facts of the dispute[1]. Also, the personal interest of the party seeking the documents may be even more compelling than the general concern for political accountability. If relevant information is unavailable, his ability to present his case may be prejudiced, and he may lose the dispute and suffer a monetary loss; or, in the context of a criminal prosecution, he may lose his personal freedom. When an ordinary requester under a freedom of information statute fails to obtain a document because it is within the ambit of an exemption, he will be less well-informed about government conduct, but will probably not suffer personal damage as a direct result.

The immediacy of the interest favouring disclosure in the context of litigation suggests, then, that the criteria for disclosure of material subject to Crown privilege should permit greater access than those applied in a general freedom of information statute. Government information should be withheld in litigation only if very serious harm to the public interest will result. Yet, when the kinds of information typically available under a freedom of information statute are compared with the range of documents that courts have ordered to be released in litigation, it is clear that this is not inevitably the case. The common law may afford wider access in some cases, but not in others. For example, many freedom of information statutes control

public access to policy-making documents by an exemption establishing a fact-opinion distinction. A requester can obtain a completely factual document used in the policy-making process. If a litigant requested the same document, the case law relating to Crown privilege suggests that it would be unavailable; many cases state that policy documents are to be protected, regardless of their content. In this instance, then, the common law would afford less access than would a freedom of information statute. If a litigant were permitted to choose between these two access schemes, he would prefer to apply for the document under the legislation. The explanation for this increase in the level of access under freedom of information schemes is presumably that the rules of Crown privilege were formulated at a time when citizens' claims for access to government documents as a device for ensuring the accountability of democratic governments had not received significant attention.

On the other hand, certain categories of documents may be more readily accessible under Crown privilege than they would be under a freedom of information scheme. For example, if an individual exercising freedom of information rights sought personal information about another individual, or information about a commercial enterprise, the typical exemptions would prevent access. However, such information could be made available to a litigant under Crown privilege rules. Further, it seems very likely that freedom of information statutes in Westminster-type jurisdictions will exempt documents relating to the discussions of Cabinet and the Executive Council. Our own proposals reflect this view. And yet, in a recent Crown privilege decision of the Australian High Court, Sankey v. Whitlam[2], the court compelled disclosure of documents relating to meetings of the Executive Council and other high-level policy documents. Never before had such sensitive documents been exposed by a court's refusal to accept a government claim of Crown privilege.

In short, then, the level of disclosure of government information required by the rules of Crown privilege, as currently applied, is neither consistently greater nor consistently less than that required by freedom of information schemes generally, or by our proposals in particular. Perhaps this should cause no surprise. The rules of Crown privilege were devised at an earlier time and for different purposes than were freedom of information schemes.

Against this background, we return to the questions raised earlier. First, should Crown privilege constitute a further exemption to the general rule of access advanced in our proposals? Although some schemes have adopted this approach[3], we think it unwise. The Crown privilege rules, given their somewhat uncertain

shape, would introduce an undesirable element of uncertainty into our proposals. If it is true that they might offer a more restrictive access scheme than that which we have proposed, it would be our view that they do not adequately reflect the public interest in access to government information. Further, the greater access that Crown privilege might afford might be quite reasonable in light of the higher interest asserted by one whose rights are to be adjudicated. Thus, while it may be quite appropriate, as the Australian High Court has held, to make available certain information concerning Cabinet discussions where it provides the factual substantiation for a lawsuit, we do not think that Cabinet documents containing such information should be made generally available under a freedom of information scheme.

Should Crown privilege be supplanted by the freedom of information scheme? The answer follows straightforwardly from this analysis. Clearly, the possibility of greater access to information by litigants under Crown privilege doctrine should not be precluded by freedom of information laws. There may be a danger, however, that a freedom of information law might be interpreted by the courts as a statutory statement of the level of disclosure permissible under Crown privilege[4]. This would be an unfortunate development, and it should therefore be provided in the statute that the enactment of the freedom of information scheme in no way restricts the information available to litigants under the Crown privilege rules.

Should litigants be allowed to seek access under the freedom of information scheme as well as under the Crown privilege rules? In our view, access under both sets of rules should be available. In the first place, it would be futile to restrict the litigant to those rights deriving solely from his status as a litigant and to provide that he could not apply for information under the statute. Such a restriction could easily be evaded: a litigant could simply ask a friend or agent to apply for the information on his behalf. Further, if greater access were available under the information statute than under Crown privilege, a citizen would have a lesser right to information once he had issued a writ. This would be a ridiculous and arbitrary consequence. No doubt, the possibility of this sort of confusion arising is reduced by the likelihood that the courts would see the freedom of information scheme as a minimum level of access for litigants under Crown privilege doctrine. In any event, there appears to be no sound basis for depriving litigants of the right to seek access to information under the freedom of information scheme.

## RECOMMENDATIONS

1. The doctrine of Crown privilege should not constitute a further exception to the general principle of access.
2. The doctrine of Crown privilege should continue to operate as the basis for determining requests for government information by litigants inasmuch as it may allow litigants access to a wider range of documents than are available to ordinary requesters under the freedom of information scheme. Further, the freedom of information legislation should clearly stipulate that it is not to be construed as restricting in any way the information available to litigants under the Crown privilege rules.
3. In addition to relying on the degree of disclosure secured by the Crown privilege rules, litigants should be able to apply for access to government documents under the freedom of information scheme.
4. The freedom of information law should expressly provide that the provisions of this act shall not affect the courts or any other body in the exercise of their inherent or statutory powers to compel witnesses to testify or produce documents.

## CHAPTER 19 NOTES

1 "[When] the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private." Wigmore, Treatise on Evidence, 3rd ed. (Boston: Little, Brown, 1940) para. 2192.

2 [1978] 53 A.L.J.R. 11.

3 In the U.S. Freedom of Information Act, exemption 5 excludes matters that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." The relevant legislative history indicates that it was intended to incorporate the common-law privilege of the government from discovery in litigation (H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., 2, 9 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess., 6-7, 13-14 (1964)). The unclear language of the exemption has contributed to active judicial intervention, which has interpreted it in a manner consistent with the committee reports. See K.C. Davis, 1 Administrative Law Treatise, 2d ed., 1978 at 404-5.

The Australian Freedom of Information Bill includes a provision which has the effect of incorporating the Crown privilege rules into the statute. Section 36 provides: "(1) Where the Attorney-General is satisfied that the disclosure under this Act of a particular document, or of any document included in a particular class of documents, would be contrary to the public interest on a particular ground, being a ground that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the context of the document, or of a document included in that class, as the case may be, should not be disclosed, he may sign a certificate that he is so satisfied, specifying in the certificate the ground concerned, and, while such a certificate is in force, but subject to Part V, the document, or every document included in that class, as the case may be, is an exempt document. (2) A certificate under sub-section (1) in relation to a particular document shall be deemed to refer also to every document that is substantially identical to that document." The decision of the Attorney General to give a certificate under s. 36 is subject to independent review by the Administrative Appeals Tribunal (s. 37(2)).

4 In a recent Nova Scotia case concerning Crown privilege, the court sought the aid of the Freedom of Information Act in determining the scope of the doctrine. See Attorney General of Nova Scotia v. Murphy et al. (1979), 93 D.L.R. (3d) 239 (NSSC, App. Div.).

## CHAPTER 20

# Integrating Freedom of Information with Due Process Safeguards

In previous chapters, we have considered matters relating to the granting of access to information to a person affected by a decision made by a governmental body exercising a statutory power to make determinations affecting the rights of individuals. As we have indicated, the rights of such individuals are determined by a body of legal principles (referred to here for convenience as "due process" or "procedural" safeguards) derived from the common-law rules of natural justice and from the statutory reforms introduced in Ontario in response to the recommendations made in the report of the Royal Commission Inquiry into Civil Rights (the McRuer Report)[1]. It is not the task of this Commission to enter into a reconsideration of the adequacy of these common-law and statutory rules, or to make recommendations with respect to the rights of parties to adjudicative proceedings. We believe that the public is well served by the due process safeguards introduced in response to the recommendations of the McRuer Report. However, attention must be drawn to the relationship between these procedural safeguards and the information access rights secured to "any person" under our proposed freedom of information scheme. Our recommendations on this point are similar to those relating to the relationship between the doctrine of Crown privilege and freedom of information access rights. In essence, it is our view that the two schemes should operate independently, in the sense that an individual who is engaged in proceedings relating to a determination of this kind by governmental institutions should be permitted to exercise rights of access to information secured by the freedom of information scheme. The fact that such an individual may also be entitled to obtain access to certain kinds of information by virtue of the operation of the procedural safeguards referred to above should not act as a bar to requests for access pursuant to the provisions of the freedom of information legislation. Our reasons for reaching this conclusion can be better explained against a background of the essential features of these due process principles.

As we have noted in discussions in previous chapters[2], the common-law rules of natural justice require certain kinds of governmental decision makers to give notice to a person affected by the decision of the case he has to meet. We have also indicated that the requirement of notice at common law does not necessarily require that the individual be granted direct access to the actual information or evidence on which the decision maker

will base his decision. As a general rule, as long as the individual is given notice of the substance of the case against him, the common-law notice requirement will be satisfied. The statutory reforms resulting from the recommendations of the McRuer Report further stipulate that certain procedural safeguards must be afforded to individuals who are subject to determinations made by certain kinds of governmental decision-making bodies. In part, these provisions ensure that a formal hearing is held before the decision is taken and that certain kinds of pertinent information are disclosed to the individual prior to the conduct of the hearings[3]. Further, additional statutes governing the proceedings of particular decision-making bodies require that all of the documentary evidence which will be led at the formal hearing be disclosed to the affected individual prior to the hearing[4]. It must be emphasized, however, that these statutory reforms apply to decision-making bodies required to conduct formal hearings. There are other decision-making processes established by statute that do not require hearings. In these cases, disclosure of information or evidence to be used by the decision maker to the individual whose rights or privileges may be affected is subject only to common-law notice requirements. As we have seen, access to information secured by the common-law rules may be more limited than that secured by the Ontario statutory reforms.

In summary, then, the extent to which an individual affected by an administrative decision-making process is entitled to access to information pertaining to the decision will depend, in large measure, on whether or not the process is one that involves a formal hearing.

We should emphasize, however, that the applicable disclosure obligations in these situations are limited to ensuring access to information that will form the basis of the decision-making exercise. None of the statutes or principles referred to above affords the individual the right of access to all information in government records pertaining to the matter in question. In essence, the individual is entitled either to information concerning the nature of allegations to be made against him or, in certain cases, access to the actual evidence to be led at the formal hearing.

Freedom of information legislation, on the other hand, creates a statutory right of access for any person to certain kinds of government information, regardless of the use he intends to make of the information. The question we must consider, then, is whether an individual who is affected by an administrative decision-making process (and who is therefore entitled to some form of access to government information pursuant to the due

process safeguards) should also be entitled to exercise rights of access under a freedom of information law.

It is important to note that the two different schemes for providing access to government information are not co-extensive. In certain circumstances, it might be more advantageous for an individual to seek to exercise access rights under one of these schemes rather than the other. For example, an individual who is subject to a decision-making process involving a formal hearing will be entitled to obtain access to information prior to the hearing which may, in some instances, be exempt from access under the freedom of information scheme. Certain kinds of investigative material to be led in evidence in the formal hearing might be accessible to the individual by virtue of the statutory due process safeguards, but might not be available to him under the provisions of the freedom of information law. Alternatively, it is possible to imagine situations in which an individual affected by a determination might have greater rights of access under the freedom of information law than he would under applicable due process rules. For example, a claimant for a benefit of some kind may be subject to a decision-making process in which no formal hearing is required, at least in the first instance of decision making. As indicated above, such an individual may be entitled to some information about the decision-making process, but he will not ordinarily have a right of access to government documents forming the basis of the decision-making process. He might, however, be entitled to some or all of those documents under the freedom of information scheme.

How, then, are the freedom of information and due process rules to intersect? In particular, is an individual who is the subject of an administrative decision-making process to be entitled to exercise rights of access under the freedom of information act? As we have indicated above, it is our conclusion that he should be entitled to do so. There are two reasons for this. First, the freedom of information law establishes a minimum level of public access to which "any person" is entitled, and this level of access should be secured to individuals who are subject to administrative decision-making processes. Second, we believe that it would be impractical to suggest that such individuals be denied freedom of information rights and left only with their information rights under applicable due process safeguards. If such a rule were established, an artificial distinction would be drawn between individuals engaged in such proceedings and individuals who merely might at some future time be involved in such proceedings. Further, such a rule could be easily evaded; a cooperative third party could proceed with a freedom of information request on the individual's behalf.

Once it is accepted that a party affected by an administrative decision-making process may seek access to information pursuant to the freedom of information law, further procedural implications arise. If we assume that a party to the proceedings has sought access under the freedom of information law to a government record relevant to the administrative proceeding, should the fact that the freedom of information request is pending operate as a stay of the administrative proceedings, until the request has been acted upon? On the one hand, if a stay is not granted, the party may obtain the information too late to make use of it in the administrative proceeding. On the other hand, if a stay is granted automatically in such circumstances, requests for access under the freedom of information law could be used unnecessarily to delay administrative decision-making processes.

Solutions to this procedural dilemma have been developed in the American case law interpreting the provisions of the U.S. Freedom of Information Act (FOIA). A number of the federal independent regulatory agencies that engage in decision-making processes have developed their own rules of information access (or "discovery") relating to the rights of parties to such proceedings to obtain information from the agency itself. In some cases, the question has arisen as to whether a party involved in a proceeding before such an agency may use freedom of information act requests to supplement the agency's discovery procedures. The position adopted by the American courts is in accord with the recommendation we have made above. U.S. courts have held that the fact that a person requesting information from an agency pursuant to the FOIA is also a party to a proceeding before the agency neither diminishes nor augments the individual's right to information under the FOIA. Such an individual has the same right of access under the act as does any other member of the public[5].

With respect to the procedural question, the United States Supreme Court has held that federal courts hearing freedom of information requests are able, as part of their general equitable power, to enjoin administrative proceedings pending the outcome of the freedom of information request[6]. The court has cautioned, however, that this power should be used sparingly. The American case law relating to injunctions suggests that to succeed on an application for a stay of administrative proceedings pending the outcome of an FOIA request, a party must be able to show:

1. that he will suffer irreparable harm if relief is not granted;
2. that he will probably succeed on the merits in the disputed case;

3. that other persons will not suffer substantial harm if a stay is granted; and
4. that the public interest will be served by the disclosure[7].

Although we do not feel that it would be fruitful to engage in an elaborate consideration of the existing framework of Ontario law providing for the judicial review of administrative decision-making activity, we do recommend that consideration be given to clarifying the extent to which the courts are or should be empowered to enjoin administrative decision-making proceedings pending the outcome of a freedom of information request. It is our general view that the criteria adopted in the U.S. case law suggest a useful basis for making determinations in a particular case as to whether a stay of the administrative proceedings is appropriate.

#### RECOMMENDATIONS

We recommend the following with respect to the relationship between the freedom of information scheme and the procedural safeguards relating to administrative decision-making processes:

1. The fact that a person is involved in administrative decision-making proceedings should not operate as a bar to the exercise of rights of access under the freedom of information law;
2. Consideration should be given to the need for clarifying the extent to which existing mechanisms for judicial review of administrative decision making would include the power to order a stay of administrative proceedings pending the outcome of a request for information under a freedom of information statute.

## CHAPTER 20 NOTES

- 1      Report of the Royal Commission Inquiry into Civil Rights (Toronto: Queen's Printer, 1968).
- 2      See Chapter 7, Section B and Chapter 8, Section C. See also L. Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979) cited hereafter as Fox, 262-67, and M. Connelly, Securities Regulation and Freedom of Information (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 8, 1979) cited hereafter as Connelly, 150-56.
- 3      The Statutory Powers Procedure Act, S.O. 1971, c. 47, s. 8 requires pre-hearing disclosure of "reasonable information" of any allegations respecting a party's "good character, propriety of conduct or competence" where these will be in issue in the proceedings.
- 4      Approximately thirty-seven Ontario statutes contain provisions requiring that a party "shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given at the hearing." See Fox, 34-35.
- 5      See, for example, NLRB v. Robbins Tire and Rubber Co. (1978) 437 U.S. 214, 242; Columbia Packing Co. v. Dept. of Agriculture (1977) 563 F. 2d 495 (1st Cir.).
- 6      Renegotiation Board v. BannerCraft Clothing Co. Inc. (1974) 415 U.S. 1, 18-26. See also Connelly, 155.
- 7      J.T. O'Reilly, Federal Disclosure Law (Colorado Springs: Shepard's, 1979) s. 8.12.

## CHAPTER 21

### Oaths of Secrecy

As we have indicated in Chapter 7, the Ontario Public Service Act[1] and at least fourteen other Ontario statutes[2] require civil servants and other government employees who are not members of the civil service to take an oath that they will not disclose information. The oath under The Public Service Act reads:

I, ......., do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and, except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.

So help me God.

In our previous discussion, the restrictive nature of the wording of this oath was the subject of comment. In particular, attention was drawn to the fact that the oath permits disclosure only where it is "legally required." As we have indicated elsewhere in this report, situations in which the disclosure of information is so required occur very rarely.

Rigid adherence to the precise terms of the oath would seriously impede the functioning of government. Indeed, strict compliance with the oath would prevent public servants in the same department from communicating with one another. As one might expect, breaches of the oath occur routinely in practice. We have been advised that disclosure of information is not considered to be a breach of the oath if it has been authorized by a senior official. The Civil Service Commission advises government employees that the oath prohibits disclosure of any information prejudicial to the government or to an employee of the government.

There can be no doubt that the oath of secrecy has an inhibiting effect on the willingness of public servants to disclose information to members of the public. In the absence of clear directives indicating the kinds of information which can be disclosed, it is to be expected that the policy of secrecy embodied in the oath will have considerable influence upon public servants (especially those of a relatively junior rank) responding to requests for information. In the course of interviews undertaken by our research staff, many government employees expressed

their concern about the vagueness of the prohibition contained in the oath and confirmed the view that the oath is a restraining influence on public servants responding to inquiries from members of the public.

We believe that the adoption of a freedom of information law should be accompanied by an end to the current practice of requiring public servants to swear an oath of secrecy. Although it is true that insofar as a freedom of information scheme introduces clear guidelines for the disclosure of information to the public the influence of the oath of secrecy might be diminished, it is our view that continued use of this oath would sustain an atmosphere in which many public servants might reasonably feel that in cases of doubt, non-disclosure should be the general rule. The underlying philosophy of a freedom of information law, of course, directly contests this proposition and establishes a general presumption favouring public access to government information. It is our view that the continued use of this oath of secrecy would significantly undermine successful implementation of freedom of information legislation.

We discarded a recommendation that the existing oath be replaced by a new secrecy oath which would spell out more clearly the conditions under which information may be disclosed to the public. An oath which would adequately express the nature of the obligations imposed by a freedom of information law would be rather elaborate. We have concluded that there is little to be gained from reproducing the provisions of the freedom of information scheme in an oath of office. The development of a proper appreciation on the part of public servants of the public right to know and of the need for confidentiality with respect to certain kinds of information can only be achieved by careful instruction on the significance of the various provisions of the freedom of information legislation and the related policies of the governmental institution in question.

It may well be the case, however, that an oath of faithful service is a desirable means of emphasizing the nature of the responsibilities assumed by public servants. It is our recommendation that a suitable oath could be derived from the opening words of section 10 of The Public Service Act, in the following manner:

I, ...., do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario.

## RECOMMENDATIONS

1. The practice of requiring public servants to subscribe to the broad oath of secrecy in section 10 of The Public Service Act should be discontinued.
2. A suitable alternative to the existing secrecy oath would be an oath of faithful service, as contained in the following terms in the opening passage of section 10 of The Public Service Act:

I, ......., do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario.

3. Nothing in this recommendation should be taken to relate to other specific statutory oaths.

CHAPTER 21 NOTES

1 R.S.O. 1970, c. 386, s. 10(1).

2 For a list of these statutes, see Chapter 7 of this report.

## CHAPTER 22

# A Classification System?

One of the exemptions to the general principle of access adopted in the U.S. Freedom of Information Act permits the government to refuse to disclose information that has been properly classified under a classification scheme established by Executive Order of the President[1]. The government of Ontario does not have a formal classification scheme. It is our opinion that there is nothing to be gained, from the point of view of our freedom of information proposals, by encouraging the government to adopt such a system together with a corresponding exemption in the proposed freedom of information legislation. Nonetheless, it may be useful to indicate briefly the nature of such systems, their relationship to freedom of information schemes, and the reasons why such a scheme is not included in our freedom of information proposals.

A classification system, in essence, is a formal process whereby documents are marked in gradations of secrecy and confidentiality. Once classified, a document is not to be disclosed to anyone other than those individuals (usually civil servants) who have been authorized to inspect and handle documents in that class[2]. Unauthorized individuals, other civil servants and the general public are, in theory at least, denied access to them.

Traditionally, such classification systems have been reserved for documents that pertain to national defence, national security, and the conduct of international affairs or foreign policy. The specific objective of these systems has been said to be the protection of such documents from foreign espionage[3]. The fewer people inside government who are authorized to handle such documents, the less likely it is that such documents will fall into the hands of foreign agents. In Britain, and in Canada at the federal level, Official Secrets Acts operate in conjunction with or parallel to classification schemes by imposing criminal penalties on those who disclose official information without proper authority to do so[4]. Although these acts do not specifically refer to the classification systems, disclosure of information in violation of the scheme would be an obvious case of disclosing without authority and would thus constitute an offence.

The U.S. classification system is based primarily on executive orders issued by the President. There is no statutory authority for its establishment[5]. In recent years, intense criticism has been directed at the classification system, with the

result that various presidents have made substantial changes in the operation of the system.

Substantial reforms were introduced in an executive order in June 1978[6]. That order authorizes the classification of information bearing on national security and international affairs into three protected categories: top secret, secret and confidential. These are terms which are defined in some detail in the order. The order places an important new limitation on the classification process by requiring that before a classification can take place, those authorized to classify documents must show that "identifiable harm" to national security would result if such information were not classified. Another significant innovation is that most documents would be declassified after six years, though extremely sensitive documents may remain classified for twenty years. Previously, most documents were only declassified after thirty years.

The Freedom of Information Act (FOIA) exemption refers specifically to executive orders of this kind in the following terms:

(b) This section does not apply to matters that are --

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;...

Part B of this exemption was added as part of the 1974 amendments to the act[7] in order to meet an alleged abuse of overclassification. The amendment provides for judicial review of the classification decision in cases where a request for access under the act has been denied on the basis that the document is classified.

The 1978 executive order further limits the apparently absolute nature of this exemption. Although the act provides that if the document is properly classified there can be no access, the new order qualifies this by requiring the agency to determine in each case whether the release of the classified information would occasion "identifiable harm" to the national interest. If such harm cannot be demonstrated, the information must be released.

The 1974 FOIA amendment and the 1978 executive order substantially alter the nature of the classification system and its significance for the Freedom of Information Act. Classification can now be viewed as essentially an internal administrative

guideline. The classification system alerts public servants to the fact that they are dealing with sensitive documents. In the face of a request for access, they must weigh the public's interest in access against the interest in security before denying access to the particular documents. Moreover, the decision to classify a document can be reviewed by the courts in the context of the exercise of FOIA rights. To be sure, classification may restrict the dissemination of documents within government, but it must be noted that the United States has no precise equivalent to an Official Secrets Act that would make the unauthorized possession of such documents a criminal offence.

The current relationship of the classification system to the FOIA would not be significantly altered by simply repealing the classification system exemption and replacing it with a provision which specifically and directly exempted material the disclosure of which would be harmful to national defence or foreign policy. As is the case under the present scheme, access to existing documents would be tested on the basis of identifiable harm (rather than classification) and the decision to deny access would be subject to judicial review. The executive branch might wish to continue the operation of the classification system for the internal administrative purposes suggested above. Under the existing FOIA exemption, of course, it is true that the President retains the power to define the notion of "harm to national defense or foreign relations." Yet, it is most unlikely -- and the 1978 executive order offers abundant evidence of this -- that such a definition by presidential fiat would undermine the general right of access secured by the act. In any event, if a change in the act removed the potential power of the executive branch to undermine the legislation, such a change might be seen as consistent with the act's underlying purpose and philosophy.

In Canada, at the federal level, a classification system is in operation. Like its U.S. counterpart, its establishment has not been authorized by a statute, but is embodied in a Cabinet directive. Implemented during World War II and the post-war years, the system sought to protect documents pertaining to national defence and security from foreign espionage. Four categories of classified documents were created: top secret, secret, confidential and restricted. As others have pointed out, the precise meaning of each term is not clear[8]. Moreover, there does not appear to be any formal declassification system; however, again by Cabinet directive, most of the above documents would be declassified on the basis of the "thirty-year rule," that is, the established rule under which several Commonwealth governments have traditionally removed restrictions on public access to documents after thirty years.

The federal Green Paper on access to public documents identified a basic problem with the operation of the classification system: documents which do not relate to national defence or security or international relations are classified under the system. The explanation offered for this by the Green Paper is that no other legal protection exists for such documents[9]. This tendency of public servants to overclassify had previously been criticized in the Report of the Canadian Royal Commission on Security[10]. It is also a recurring theme in discussions of the U.S. classification system[11].

In Ontario, as we have indicated, there is no formal, generally applicable classification system in operation. Unstructured and ad hoc practices exist, and the kinds of documents marked "confidential" vary from department to department, unit to unit, and even from official to official[12]. As well, it is common practice to mark Cabinet documents "confidential" and indeed, to treat them as such even when no such marking has been made.

Whatever merit these practices may have for internal administrative purposes, it is clear that there is no systematic classification system in place with could form the basis of an exemption to the general principle of public access. More than this, however, we are concerned that the ability of public officials to design and implement their own ad hoc marking systems is likely to lead to an excess of such markings, and encourage the maintenance of levels of secrecy well beyond those which we have identified as defensible in this report. Accordingly, we recommend that these practices be subjected to an internal review for the purpose of eradicating marking practices which would discourage a full and complete implementation of the substance and underlying spirit of the proposals we have advanced.

Further, we do not feel that any revised system of markings should be embraced as an exemption to the general principle of access to be adopted in our proposed freedom of information law. We believe that the interests to be protected by government secrecy can be adequately stated in the legislation itself. It is therefore unnecessary to delegate the ability to define a further exemption through the use of a classification scheme. It is preferable, in our view, to stipulate directly in the legislation itself that certain kinds of cabinet documents are exempt rather than to permit a delegation of authority (presumably to Cabinet Secretariat officials) to mark documents in such a way as to render them immune from the access rules.

## RECOMMENDATIONS

1. An internal review should be undertaken of practices associated with the marking of documents with various grades of confidentiality with a view to eradicating practices that might undermine a full and complete implementation of the substance and spirit of our recommendations.
2. Whatever classification scheme, if any, might be adopted, it should be adopted for internal administrative purposes only. Marked documents per se should not constitute an exemption to the legislated freedom of information scheme.

## CHAPTER 22 NOTES

- 1 5 U.S.C. 552, s. (b)2.
- 2 Usually such civil servants are screened by the country's national security force to ensure that they do not constitute security risks.
- 3 D.F. Wall, "The Provision of Government Information" (Ottawa: Privy Council Office, April 1974) 14.
- 4 The Canadian act is briefly described in Chapter 7 of this report.
- 5 See, generally, "Project: Government Information and the Rights of Citizens" (1975), 73 Michigan L. Rev. 971 at 973-1015.
- 6 EO 12065, dated June 28, 1978, effective Dec. 1, 1978.
- 7 See, generally, Chapter 6, Section B of this report.
- 8 See, for example, T. Murray Rankin, Freedom of Information -- Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, 1977) 34-36.
- 9 Canada, Secretary of State, Legislation on Public Access to Government Documents (Ottawa: Minister of Supply and Services, 1977) 14.
- 10 Report of the Royal Commission on Security (Ottawa: Queen's Printer, 1969) 71-72.
- 11 See, for example, note 5; and M.H. Halperin and D.N. Hoffman, Top Secret: National Security and the Right to Know (Washington: New Republic Books, 1977).
- 12 See Ontario, Ministry of Treasury and Economics, Catalogue of Statistical Files in the Ontario Government, 1978 March 1979 (For Government Use Only).

## CHAPTER 23

# Rule-Making Procedures

In a research paper prepared for the Commission[1], Professor David Mullan has argued for the adoption in Ontario of a compulsory scheme of "notice and comment" which would require the prior publication of rules which government departments and agencies intend to adopt, in order to provide an opportunity for interested members of the public to submit comments in writing to the department or agency concerned. Such a scheme, embodied in the U.S. Administrative Procedures Act[2], applies to U.S. federal departments and agencies, and similar acts are in place in the majority of states.

The consideration of rule-making procedures of this kind is related, albeit somewhat tangentially, to the work of this Commission. One of the questions which we have addressed in this report is whether the citizen should have a right of access, not only to the "public" law found in statutes and regulations, but to the "secret" law of government departments and agencies found in their policy manuals, directives, guidelines, precedents and the like. It is our recommendation that all such material should be available to the public. A further question which can be considered with respect to this material is whether it should be made available to the public prior to its adoption as binding policy so that some opportunity for informal comment would be provided. (It is to be noted, of course, that legislation is largely exempt from this concern in that its merits are ultimately debated publicly in the Legislative Assembly prior to passage.) As Professor Mullan's paper demonstrates, however, a persuasive argument can be made that regulations and other instruments containing rules should be subject to notice and comment procedures. No Canadian jurisdiction has adopted a general rule of this kind, nor have proposals to this effect found favour in England. There have, however, been a number of instances in which particular agencies have been required by statute to follow rule-making procedures of this kind, or have voluntarily adopted such practices[3].

More typically, both Ontario and Canada have devised schemes which attempt to ensure some opportunity for review of formal regulations by a committee of the legislature. (A similar approach has been adopted in England[4].) In Ontario, for example, regulations must be referred to the Standing Committee on Regulations of the Legislative Assembly for the purpose of review[5]. That review, however, is related to the legality and form of the

regulations and not to their substantive merit. The committee is prevented by the legislation from inquiring into the "merits of the policy or objectives to be effected by the regulations or enabling statutes"[6].

Professor Mullan's view is that legislative supervision of rule making is not an adequate response to the need for public scrutiny of and participation in the policy-making processes which result in the adoption of "rules." He notes that in an era of highly complex government it is inevitable that "more and more important legislation and policy is being created outside the parliamentary arena under subordinate legislation-making powers conferred by primary legislation or under broad mandates for the development of policy within jurisdictions conferred by statute"[7]. In Professor Mullan's view, this is not only unavoidable but also desirable, inasmuch as the legislature obviously has neither the time nor the expertise to do everything. Many illustrations of this feature of modern government can be drawn from the Commission's research work[8].

Professor Mullan argues that, given the fact that important policy-making activity takes place outside the legislature, activity of this kind ought to be conducted in a manner similar to the legislative process -- there should be some opportunity for comment and criticism of proposed rules, just as there is an opportunity for comment and criticism on bills proposed by the legislature. If the growth of policy making outside the legislature is inevitable, it is important to ensure that mechanisms permitting public scrutiny of this policy-making or rule-making process are put in place.

Professor Mullan further argues that the establishment of "after-the-event" review by legislative committees is not an effective method of public scrutiny of this policy-making process. These committees are typically assigned the limited role of assessing merely the legality and form of the regulations in question. It is not their role to criticize the merits of the particular regulation or to substitute their own views of public policy relating to the matter in question. The merits will have been settled long before the regulation comes forward for review by the legislative committee.

However, in Professor Mullan's opinion, conferring a power on the legislative committee to deal with the merits of each regulation which comes forward for review is not a satisfactory solution. The committee is not likely to have expertise or experience in every issue that might come before it. It is preferable that the scrutiny take place at the time when the agency possessing the expertise develops its proposals for particular rules.

For example, the legislative committee is not likely to be composed of experts in securities regulation. Review by the committee of the merits of regulations under The Securities Act is not likely to be a particularly fruitful exercise[9]. It would be far better, Professor Mullan believes, to ensure that institutions such as the Securities Commission permit some public scrutiny at the time when they are first developing their regulations[10].

The imposition of a "notice and comment" requirement would meet these concerns, it is argued. The opportunity for informed comment by the public increases the likelihood that rules will be more responsive to the realities and exigencies of the areas which they cover.

Professor Mullan does note, however, that criticisms have been made in the United States of some aspects of this rule-making procedure. Some problems have resulted from the development by agencies of much more complicated procedures than are required by the bare "notice and comment" rule. The essence of "notice and comment" is simply that notice of proposed regulations or rules is made, and an opportunity given for written comments to be submitted to the agency. Many U.S. agencies have adopted more elaborate trial-like procedures involving extensive public hearings. In some cases, the courts have imposed procedures of this kind on particular exercises of rule-making powers. The effect of this has been to render some rule-making exercises unreasonably expensive and dilatory. To meet these concerns, Professor Mullan suggests that only the minimal "notice and comment" rule should be imposed in an Ontario scheme. To simply leave the matter to the experimentation of individual departments and agencies is an unattractive alternative. Professor Mullan argues that if the minimal notice and comment requirements are desirable, it would be a waste of public resources to force each and every department and agency to agonize over the decision of whether or not to adopt this procedure. The individual departments and agencies would be left, however, to determine for themselves whether they wished to adopt more elaborate procedures involving, for example, a public hearing process.

It is evident that the case for the adoption of a "notice and comment" scheme has been carefully and forcefully argued by Professor Mullan. We are of the view, however, that it would be unwise for this Commission to put forward proposals of this kind as part and parcel of our recommendations for a freedom of information scheme. First, we should note that the adoption of such rule-making procedures has proved to be a contentious issue in parliamentary jurisdictions. The idea was rejected by the Donoughmore Committee in England in 1932[11], and more recently in Canada by the Ontario Royal Commission Inquiry into Civil

Rights[12] and the federal Special Committee on Statutory Instruments[13]. None of the public briefs presented to this Commission, and none of the submissions made by government departments, addressed this question. As we have said, the Commission feels that this is an area only tangentially related to our inquiry. We believe that a more thorough examination of this question, which we hope may be inspired in part by Professor Mullan's paper, should precede the formulation of specific recommendations for government action.

In particular, we are hesitant about the wisdom of introducing a scheme the effect of which would be to nullify policies adopted in a manner which failed to comply with the required procedures. We note that similar reservations have been expressed by the Economic Council of Canada in a recently published report[14]. We do believe, however, that the voluntary adoption of such procedures by agencies and adoption on the basis of provisions inserted in their enabling statutes should be encouraged.

#### RECOMMENDATIONS

1. We recommend that governmental institutions engaged in rule-making activity be encouraged to adopt notice and comment procedures so as to facilitate public discussion and informed comment on particular rules proposed for adoption.
2. Consideration should be given to the adoption of provisions requiring notice and comment opportunities in specific statutes which confer rule-making powers on governmental institutions.

## CHAPTER 23 NOTES

- 1 David Mullan, Rule-Making Hearings: A General Statute for Ontario? (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 9, 1979), cited hereafter as Mullan.
- 2 5 U.S.C. c. 5, ss. 551 and 553.
- 3 See, for example, Mullan, 67-101.
- 4 See generally, H.W.R. Wade, Administrative Law, 4th ed. (Oxford: Clarendon Press, 1977) 731-37; S.A. de Smith, Constitutional and Administrative Law, 3rd ed. (Harmondsworth: Penguin, 1977) 331-41; J. Beatson, "Legislative Control of Administrative Rule-Making: Lessons from the British Experience?" (1979), 12 Cornell Int. L.J., 199.
- 5 See The Regulations Act, R.S.O. 1970, c. 410, and L. Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979) 188-97, cited hereafter as Fox.
- 6 Ibid., sec. 12(3).
- 7 Mullan, 5.
- 8 See, for example, T.G. Ison, Information Access and the Workmen's Compensation Board (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 4, 1979), especially 48-67; M.Q. Connelly, Securities Regulations and Freedom of Information (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 8, 1979) cited hereafter as Connelly, especially 79-95, and Fox, especially 202-18 and 248-59.
- 9 See Connelly, 93-95.
- 10 We should note, of course, that the Securities Commission does indeed encourage such scrutiny through the conduct of public hearings. See Connelly, 73-77. Also, the Occupational Health and Safety Act, 1978, S.O. 1978, c. 83 provides for public notice and comment in the making of regulations with respect to the use of toxic substances.
- 11 Report of the Committee on Minister's Powers (1931-32; Cmnd. 4060).

- 12 Report of the Royal Commission Inquiry into Civil Rights  
(Toronto: Queen's Printer, 1968) Vol. 1, 364.
- 13 Third report of the Special Committee on Statutory Instruments (the MacGuigan Committee) (Ottawa: Queen's Printer, 1969).
- 14 Economic Council of Canada, Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) 72.

## CHAPTER 24

# Sunshine Proposals

In our discussion of U.S. freedom of information legislation[1] a brief account was given of the Government in the Sunshine Act and the Federal Advisory Committee Act. These statutes require certain federal policy-making agencies and non-governmental advisory committees to hold their meetings in open session so that members of the press and public can attend and observe their deliberations. These "sunshine" or "open meetings" laws operate differently from the Freedom of Information Act (FOIA). The FOIA is concerned, of course, with public access to government records. Sunshine laws are concerned with the public right to attend and observe the meetings of government agencies. Nonetheless, the rationale underlying sunshine laws is similar to that of the FOIA. By ensuring that members of the public can observe how the business of these institutions is conducted, public accountability of government will be enhanced. Citizens will be better able to assess the performance of public bodies and to evaluate the merits of their advice to government and the reasons behind policy decisions.

There exist in Ontario a number of boards, agencies, commissions, institutions and corporations, partially or wholly financed with public monies, which exercise statutory powers to make decisions or to provide advice and recommendations to the government on matters of public concern. Many of these institutions are of such a nature that they would be subject to the open meeting requirements of the "sunshine" laws in the United States. However, we have not made an extensive examination of the need for, or the possible implications of, the enactment of provisions of this kind. The subject of open meetings was not, in our view, central to our task of making recommendations with respect to freedom of information and privacy protection. Moreover, the briefs presented to the Commission did not identify the question of requiring provincial public bodies to conduct open meetings as a matter of concern to interested citizens. We are therefore not in a position to make recommendations with respect to the adoption of "sunshine" laws applicable to governmental institutions at the provincial level.

A number of submissions from members of the public did argue, however, for reform of the law respecting open meetings of local government bodies. Accordingly, a research study undertaken on behalf of the Commission examined this question[2]. This study

confirmed that the existing law of Ontario is inadequate to ensure that members of the public are able to attend and observe the deliberations of municipal governmental institutions in Ontario. Suggestions for reform of the law were also made in the submission of the Association of Municipalities of Ontario, a body whose membership includes both elected and appointed municipal officials. The association made the following recommendations in its brief:

1. The Association endorses, as a general principle, the right of the individual in society to full, objective and timely government information, and the corresponding duty of municipal government to make available information about its affairs.
2. The Association strongly supports a comprehensive review and updating of all legislation governing public access to municipal information with a view to its consolidation and clarification in accordance with the following recommendations:
  - a. The Association would support the introduction of legislation which, having regard to the distinctive nature of municipal government, would establish clear rules concerning the conduct of public business in municipalities by stipulating that all meetings of councils, committees of council, and local boards shall be open to the public subject to certain specific exceptions (for example, when personnel, labour relations, property acquisitions and advice of counsel on pending or possible litigation matters are being dealt with)...[3]

The other recommendations made by the association favoured a legislated right of public access to information held by municipal bodies; this issue is covered by our proposals for a freedom of information statute.

As we noted in a previous chapter[4], the present law gives a great deal of discretion to the members of local government bodies to exclude the public from most, if not all, of their discussions and deliberations. As long as the formal votes are taken in public session, the legal requirements relating to the conduct of meetings are satisfied. On the basis of our research findings and the submissions we have received, we recommend that legislation be adopted which will require that all meetings of local government bodies and their committees (including executive committees and committees of the whole) be held in open session, subject to certain specified exemptions. Our recommendations are as follows.

## RECOMMENDATIONS

1. The requirements relating to open meetings should apply not only to local government bodies, such as municipal councils and school boards whose members are directly elected by the public, but also to special purpose bodies at the municipal level that are financed by municipal property taxes. These would include, for example, boards of health, conservation authorities, housing authorities, and utilities commissions.
2. The legislation should provide that meetings may be closed in order to allow discussion of the following matters:
  - a. personnel matters where a named employee or potential employee is involved, unless the individual has requested that the matter be discussed in a meeting open to the public;
  - b. election of the chairman or head of the body;
  - c. election of the executive committee of the body;
  - d. contract negotiations with employees;
  - e. property acquisitions and sales;
  - f. discussions concerning litigation;
  - g. any matters, if discussed by a police commission in public, would be injurious to its function;
  - h. any matters specifically restricted by other legislation resulting from this Commission's recommendations with respect to privacy protection.
3. These exemptions should be permissive rather than mandatory, thus leaving a discretion to hold open meetings even if the matters to be dealt with would fall within one of the exemptions (with the exception of 2(h) above).

To ensure that open meetings legislation is effective, we further recommend that it include:

4. A requirement of adequate advance notice of the time, place and list of the matters to be discussed at the meeting in order that interested members of the public are able to attend. This requirement should also apply when it is intended to hold a closed meeting, and the reasons for closing the meeting should be set out.

5. A requirement that minutes be kept of the proceedings of all meetings of local bodies and made available to the public on request. In the case of closed meetings, minutes should be made available with deletions, where necessary, to protect specified interests.
6. An express provision that "any person" may enforce the open meetings requirements by applying to the courts to enjoin the improper closing of a meeting[5].

## CHAPTER 24 NOTES

- 1 See Chapter 6 of this report. See also U.S. Senate and U.S. House of Representatives, Source Book on Government in the Sunshine Act (Washington: USGPO, 1976).
- 2 S.M. Makuch and J. Jackson, Freedom of Information in Local Government in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 7, 1979).
- 3 Association of Municipalities of Ontario, Brief No. 90.
- 4 See Chapter 8, Section H of this report.
- 5 The U.S. Government in the Sunshine Act empowers the court in such cases to conduct an expedited hearing and to order that the meeting not be held until the dispute over the propriety of the proposed closing is resolved. Similar provisions should be included in any Ontario legislation to ensure that the injunctive remedy is of practical value.



## **Appendix: Statutory Material**



## A. CANADA

BILL C-15 (ss. 1-48; 62; 70)

An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada and to amend the Canada Evidence Act, the Federal Court Act and the Statutory Instruments Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

### SHORT TITLE

1. This Act may be cited as the *Freedom of Information Act*.

### PURPOSE OF ACT

2. The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in government records, recognizing the principle that government information should be available to the public and recognizing that necessary exceptions to the principle should be limited and specific and that the application of those exceptions should be reviewed independently of government.

### INTERPRETATION

#### 3. In this Act,

“designated Minister”, in relation to any provision of this Act, means such member of the Queen’s Privy Council for Canada as is designated by the Governor in Council to act as the Minister for the purposes of that provision;

“government institution” means any department or ministry of state of the Government of Canada listed in the schedule and any board, commission, body or office listed in the schedule;

“head”, in respect of a government institution, means

(a) in the case of a department or ministry of state listed in the schedule, the member of the Queen’s Privy Council for Canada presiding over that institution, or

(b) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

“Information Commissioner” means the Commissioner appointed under section 49;

“record” includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.

### ACCESS TO GOVERNMENT RECORDS

#### *Right of Access*

##### 4. Subject to this Act, every person who is

(a) a Canadian citizen,

(b) a permanent resident within the meaning of the *Immigration Act, 1976*, or

(c) a corporation incorporated by or under a law of Canada or a province

has a right to and shall, on request, be given access to any record under the control of a government institution.

#### *Information about Government Institutions*

5. (1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act; and

(c) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

(2) The designated Minister shall cause the publication referred to in subsection (1) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access thereto in order to be informed of the contents thereof.

#### *Requests for Access*

6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution to identify the record.

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

8. (1) Where a government institution receives a request for access to a record under this Act that the head of the institution considers should more appropriately have been directed to another government institution that has a greater interest in the record, the head of the institution may,

within fifteen days after the request is received, transfer the request to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

(3) For the purposes of subsection (1), a government institution has a greater interest in a record if

(a) the record was originally produced in the institution; or

(b) in the case of a record not originally produced by a government institution, the institution was the first institution to receive the record or a copy thereof.

9. The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution, or

(b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit

by forthwith giving notice of the extension and the length of the extension to the person who made the request, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

10. (1) Where the head of a government institution refuses to give access to a record or a part of a record requested under this Act, the head of the institution shall state in

the notice given in respect of the record under paragraph 7(a)

(a) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the record existed; and

(b) that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

(2) The head of a government institution is not required under subsection (1) to indicate whether a record requested under this Act exists.

(3) Where the head of a government institution fails to give access to a record or part of a record requested under this Act within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access to the record.

**11.** (1) Subject to this section, a person who makes a request for access to a record under this Act shall pay

(a) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation toward the costs of search for or production of the record and the costs of reviewing the record; and

(b) before any copies are made, a reasonable fee, determined by the head of the government institution that has control of the record, reflecting the cost of reproducing the record or part thereof.

(2) The head of a government institution to which a request for access to a record is made under this Act may, before giving access to the record, require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for, produce or review the record.

(3) Where the head of a government institution requires payment of an amount under

subsection (2) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search, production or review of the record is undertaken.

(4) Where the head of a government institution requires a person to pay an amount under subsection (2) or (3), the head of the institution shall

(a) give written notice to the person; and  
(b) in the notice, state that the person has a right to make a complaint to the Information Commissioner about the amount required.

(5) The head of a government institution to which a request for access to a record is made under this Act may, in his discretion, waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

#### *Form of Access*

**12.** (1) Subject to subsection (2), a person who is given access to a record or a part thereof may, at the option of the person,

(a) be given a copy of the record or part thereof; or  
(b) examine the record or part thereof.

(2) No copy of a record or part thereof shall be given under this Act where

(a) it would not be reasonably practicable to reproduce the record or part thereof by reason of the length or nature of the record; or

(b) the making of such copy would involve an infringement of copyright other than copyright of Her Majesty in right of Canada.

(3) Notwithstanding any other Act, there is no obligation to give access to a record under this Act in any language other than that in which it exists but where a record exists in both official languages of Canada, as declared in the *Official Languages Act*, a

person who is given access shall be given access in the official language of his choice.

#### EXEMPTIONS

##### *Obligations of Government*

**13.** The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information that was obtained in confidence under an agreement or arrangement

- (a) between the Government of Canada and the government of a foreign state or an international organization of states; or
- (b) between the Government of Canada and the government of a province.

**14.** The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which could reasonably be expected to affect adversely federal-provincial negotiations.

**15.** (1) The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which could reasonably be expected to be injurious to the conduct by Canada of international relations, the defence of Canada or any state allied or associated with Canada or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, including, without restricting the generality of the foregoing,

- (a) information, assessments and plans concerning military tactics or strategy including exercises and operations aimed at preparing for hostilities or detecting, preventing or suppressing hostile or subversive activities;

- (b) information concerning the military characteristics, capabilities or deployment of weapons or defence equipment, including any articles being designed, developed, produced or considered for use as weapons or defence equipment;

- (c) information concerning the military characteristics, capabilities or role of any

military force or any defence establishment, unit or personnel;

(d) intelligence obtained or prepared for

- (i) the defence of Canada or any state allied or associated with Canada, or

- (ii) the detection, prevention or suppression of subversive or hostile activities;

- (e) intelligence respecting foreign states, international organizations of states or citizens of foreign states the release of which would interfere with the formulation of policy of the Government of Canada or the conduct by Canada of international relations;

- (f) information on methods of collecting, assessing or handling intelligence referred to in paragraphs (d) and (e) and information on sources of such intelligence;

- (g) information on the positions of the Government of Canada, governments of foreign states or international organizations of states the release of which would interfere with international negotiations;

- (h) diplomatic correspondence exchanged with foreign states or international organizations of states, except correspondence the disclosure of which is consented to by the states or organizations involved; and

- (i) information relating to the communications systems of Canada and other states used

- (i) for the conduct by Canada of international relations,

- (ii) for the defence of Canada or any state allied or associated with Canada, or

- (iii) in relation to the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities.

(2) In this section,

(a) "the defence of Canada or any state allied or associated with Canada" includes the efforts of Canada toward detecting, preventing or suppressing activities of any person, group of persons or foreign state

directed toward actual or potential attack or other hostile acts against Canada or any state allied or associated with Canada; and

(b) "subversive or hostile activities" means

(i) espionage or sabotage,

(ii) activities of any person or group of persons directed toward the commission of terrorist acts in or against Canada or other states,

(iii) activities directed toward accomplishing governmental change within Canada or other states by the use of or the encouragement of the use of force, violence or any criminal means,

(iv) activities directed toward gathering intelligence relating to Canada or any state allied or associated with Canada, and

(v) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada.

16. The head of a government institution may refuse to disclose a record requested under this Act where the record contains

(a) information obtained or prepared by any government institution or part of a government institution that is an investigative body specified in the regulations in the course of investigations pertaining to

(i) the detection, prevention or suppression of crime, or

(ii) the enforcement of any law of Canada or a province;

(b) information relating to investigative techniques or plans for specific lawful investigations; or

(c) any other information the disclosure of which would be injurious to law enforcement, the conduct of lawful investigations or the security of penal institutions.

17. The head of a government institution may refuse to disclose a record requested under this Act where the record contains

information the disclosure of which could reasonably be expected to threaten the safety of an individual.

18. The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which would have a substantial adverse effect on the economic interests of Canada including, without restricting the generality of the foregoing,

(a) information relating to the currency, coinage or legal tender of Canada;

(b) information concerning a contemplated change in the rate of bank interest, tariff rates, taxes or duties or concerning the sale or acquisition of land or property; or

(c) information relating to the regulation or supervision of financial institutions.

#### *Personal Information*

19. (1) The head of a government institution shall refuse to disclose a record requested under this Act where the record contains personal information respecting an identifiable individual including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions or views of the individual;

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence, except correspondence and replies the disclosure of which are consented to by the individual;

(g) the views or opinions of another person in respect of the individual; and  
(h) the name of the individual where it appears in a record together with other personal information relating to the individual or where the disclosure of the name itself would reveal information in respect of the individual.

(2) Subsection (1) does not apply in respect of the following classes of information:

(a) information in respect of an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment except where they are given in respect of another individual;

(b) the terms of any contract of or for personal services under which an individual performs services for a government institution, and the opinions or views of the individual given in the course of the performance of such services except where they are given in respect of another individual; and

(c) information relating to any discretionary benefit conferred on an individual, including the name of the individual and the exact nature of the benefit.

#### *Financial, Commercial, Scientific and Technical Information*

20. (1) The head of a government institution may refuse to disclose a record requested under this Act where the record contains

financial, commercial, scientific or technical information

(a) the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the government institution, where the information was supplied to a government institution on the basis that the information be kept confidential and where it is in the public interest that information of that type continue to be supplied to the government institution;

(b) the disclosure of which could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with contractual or other negotiations, of a person, group of persons, organization or government institution; or  
(c) the disclosure of which could reasonably be expected to result in undue financial loss or gain by a person, group of persons, organization or government institution.

(2) The head of a government institution may not, pursuant to subsection (1), refuse to disclose a record under the control of the institution that contains the results of product or environmental testing unless

(a) the testing was done by the government institution as a service and for a fee; or

(b) the head of the institution believes, on reasonable grounds, that the results are misleading.

#### *Operations of Government*

21. (1) The head of a government institution shall refuse to disclose a record requested under this Act if it falls within any of the following classes:

(a) records containing proposals or recommendations submitted, or prepared for submission, by a Minister of the Crown to Council;

(b) records containing agendas of Council or recording deliberations or decisions of Council;

(c) records used for or reflecting consultations among Ministers of the Crown on

matters relating to the making of government decisions or the formulation of government policy;

(d) records containing briefings to Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of consultations referred to in paragraph (c);

(e) draft legislation before its introduction in Parliament; and

(f) records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for consideration by Council in making decisions, before such decisions are made.

(2) The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information about the contents of any record referred to in subsection (1).

(3) Subsections (1) and (2) do not apply in respect of any record

(a) where disclosure of the record is authorized by the Prime Minister of Canada; or

(b) where a request is made under this Act for access to the record more than twenty years after the record came into existence.

(4) For the purposes of this section, "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

22. (1) The head of a government institution may refuse to disclose a record requested under this Act where the record contains advice or recommendations developed by a government institution or a Minister of the Crown or an account of the process of consultation and deliberation in connection therewith, if the record came into existence less than twenty years prior to the request.

(2) Subsection (1) does not apply in respect of a record or a part of a record that contains an account of, or a statement of the

reasons for, a decision made in the exercise of a discretionary power or in the exercise of an adjudicative function affecting the rights of a person.

(3) The head of a government institution may not, pursuant to subsection (1), refuse to disclose a record under the control of the institution that contains the results of product or environmental testing unless

(a) the testing was done by the government institution as a service and for a fee; or

(b) the head of the institution believes, on reasonable grounds, that the results are misleading.

23. The head of a government institution may refuse to disclose a record requested under this Act where the record contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits.

24. The head of a government institution may refuse to disclose a record requested under this Act where the record contains information that is subject to a solicitor-client privilege.

#### *Statutory Restrictions*

25. The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information that is required under any other Act of Parliament to be withheld from the general public or from any person not legally entitled thereto if the Act of Parliament

(a) provides that the requirement to withhold information be exercised in such a manner as to leave no discretion in the matter; or

(b) establishes particular criteria for withholding information or refers to particular types of information to be withheld.

**26.** Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution may refuse to disclose under this Act by reason of information contained in the record, the head of the institution shall disclose any part of the record that does not contain any such information and can reasonably be severed from any part containing such information.

#### *General*

**27.** The head of a government institution may refuse to disclose a record or a part of a record under the control of the institution if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by the Government of Canada within ninety days from the time the request is made.

**28.** The head of a government institution may, during the first year after the coming into force of this Act, refuse to disclose a record under the control of the institution that was in existence more than five years before the coming into force of this Act where, in the opinion of the head of the institution, to comply with a request for the record would unreasonably interfere with the operations of the government institution.

#### **COMPLAINTS**

**29. (1)** Subject to this Act, the Information Commissioner shall receive and investigate complaints

(a) from persons who have been refused access to a record or part of a record requested under this Act;

(b) from persons who have been required to pay an amount under subsection 11(2) or (3) that they consider unreasonable;

(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to subsection 9(1) where they consider the extension unreasonable; or

(d) in respect of any other matter relating to requesting or obtaining access to records under this Act.

**(2)** Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

**(3)** Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

**30.** A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall be made within one year from the time when the request for the record in respect of which the complaint is made was received.

**31. (1)** The Information Commissioner may refuse to investigate or may cease to investigate any complaint if, in the opinion of the Commissioner,

(a) the complaint is trivial, frivolous or vexatious; or

(b) having regard to all the circumstances, investigation or further investigation is not necessary or reasonably practicable.

**(2)** Where the Information Commissioner refuses to investigate or ceases to investigate a complaint, the Commissioner shall inform the complainant of that fact with reasons therefor.

#### **INVESTIGATIONS**

**32.** Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

**33.** Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

**34.** (1) Every investigation by the Information Commissioner under this Act shall be conducted in private.

(2) In the course of an investigation by the Information Commissioner under this Act, the person who made the complaint under investigation and the head of the government institution concerned shall be given an opportunity to make representations to the Commissioner, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

**35.** (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

- (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
- (b) to administer oaths;
- (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not such evidence or information is or would be admissible in a court of law;
- (d) to enter any premises occupied by any government institution on complying with any security requirements of the institution relating to the premises;
- (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) The Information Commissioner may, during the investigation of any complaint under this Act, examine any record or other document or thing under the control of a government institution, and no information may be withheld from the Commissioner by any person on grounds of public interest or on any other grounds.

(3) Except in a prosecution of a person for an offence under section 122 of the *Criminal Code* (false statements in extra-judicial proceedings) in respect of a statement made under this Act, in a prosecution for an offence under this Act or in a review before the Federal Court—Trial Division under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court of Canada.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

**36.** (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner

## REPORTS TO PARLIAMENT

shall provide to the head of the government institution that has control of the record a report containing

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

(b) where appropriate, a request that, within a time specified therein, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where, pursuant to paragraph (1)(b), a notice has been requested of action taken or proposed to be taken in relation to the recommendation of the Commissioner arising out of the complaint, no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

(3) Where, pursuant to paragraph (1)(b), a notice has been requested of action taken or proposed to be taken in relation to recommendations of the Information Commissioner arising out of a complaint and no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(4) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act, access is not given to the complainant, the Investigation Commissioner shall inform the complainant that the complainant has the right to apply to the Federal Court—Trial Division for a review of the matter investigated.

**37.** The Information Commissioner shall, within three months after the 31st day of December in each year, make a report to Parliament on the activities of the office during that year.

**38.** (1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Information Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 37.

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 36 have been followed in respect of the investigation.

**39.** Every report to Parliament made by the Information Commissioner under section 37 or 38 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

## REVIEW BY THE FEDERAL COURT

**40.** Any person who has been refused access to a record or part of a record requested under this Act may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court—Trial Division for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 36(2) or within such further time as the Court may, either before or after the expiry of those forty-five days, fix or allow.

**41.** The Information Commissioner may  
(a) apply to the Court, within the time limits prescribed in section 40, for a review of any refusal to disclose a record or part of a record requested under this Act in

respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(b) appear before the Court on behalf of any person who has applied for a review under section 40;

(c) intervene in any review applied for under section 40; or

(d) with leave of the Court, appear as a party to any review applied for under section 40.

**42.** (1) An application made under section 40 or 41 shall be heard and determined in a summary way.

(2) Subject to this Act, the *Federal Court Act* and the Federal Court Rules applicable to motions before the Court apply in respect of applications made under section 40 or 41 except as varied by special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*.

**43.** (1) In any proceedings before the Court arising from an application under section 40 or 41, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any other person of

(a) any information contained in a record the disclosure of which may be refused under this Act by reason of the class of records into which it falls; or

(b) any information on the basis of which the disclosure of a record or part of a record may be refused under this Act.

(2) The Court may disclose to the appropriate authority information relating to an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is substantial evidence thereof.

**44.** In any proceedings before the Court arising from an application under section 40 or 41, the burden of establishing that access to a record or part of a record requested under this Act may be refused shall be on the government institution concerned.

**45.** Where the Court determines that the head of a government institution is not entitled to refuse to disclose a record or part of a record requested under this Act, the Court shall order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

**46.** Any application under section 40 or 41 relating to a record or part of a record that the head of a government institution has refused to disclose in accordance with paragraph 13(a) or section 15 shall, on the request of the head of the institution, be heard and determined by three judges of the Court.

**47.** (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for review under section 40 or 41 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

**48.** For the purposes of sections 41 to 47, "Court" means the Federal Court—Trial Division.

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- 62.** This Act does not apply to
- (a) published material or material available for purchase by the public;
  - (b) library or museum material made or acquired and preserved solely for reference or exhibition purposes; or
  - (c) material placed in the Public Archives by or on behalf of persons or organizations other than government institutions.

- 70.** Section 41 of the *Federal Court Act* is repealed.

PART III  
EXEMPTIONS

**21. (1) Cabinet Records.**—An agency shall not, unless directed by the responsible Minister, disclose a cabinet record, as follows:

- (a) a record of the deliberations or decisions of the cabinet or of a committee of cabinet;
- (b) a record of a briefing to the cabinet or a committee of cabinet;
- (c) a record containing a policy or proposal which has been prepared by a Minister for presentation to the cabinet or to a committee of the cabinet, or which has been reviewed and approved by a Minister for presentation to the cabinet or to a committee of cabinet;
- (d) a record which has been prepared in connection with cabinet business by officers attached to the cabinet office; or
- (e) a record of a consultation between Ministers on a matter relating to government policy.

**(2) Disclosure after ten years.**—Subsection (1) does not apply to cabinet records brought into existence after the date of commencement of this Act which are more than ten years old.

**22. (1) General Exemption of Policy Advice.**—An agency may refuse to disclose a record which has been prepared by an officer of an agency and which contains an opinion, advice or a recommendation of an officer submitted to an agency for consideration in the performance of any function leading to the making of a decision or the formulation of a policy.

**(2) Limitation on Exemption.**—In any case where an agency would otherwise be entitled under subsection (1) to refuse to disclose a record of the following or of a similar nature, an agency shall not refuse to disclose such a document under subsection (1) unless conditions exist at the time under which the making of a decision or the implementation of a policy would be unreasonably impeded by disclosure of that record, namely:

- (a) a record which contains mainly factual material;
- (b) a statistical survey;
- (c) a report by a valuer, whether or not the valuer is an officer of the agency;
- (d) an environmental impact statement or like record prepared by an agency charged with the responsibility of monitoring environmental quality;
- (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
- (f) a report or study on the performance or efficiency of an agency, whether the report or study is of a general nature or is in respect of a particular program or policy;
- (g) a feasibility or other technical study, including a cost estimate, relating to a proposed government policy or project;
- (h) a report containing the results of field research undertaken preliminary to the formulation of a policy proposal;
- (i) a final plan or proposal for the reorganization of the function of an agency

or for the establishment of a new program, including a budgetary estimate for that program, whether or not the plan or proposal is subject to approval;

(j) a report of an inter-departmental committee, task force, or similar body, or of a committee or task force within an agency, which has been established for the purpose of preparing a report on a particular topic;

(k) a report of a committee, council or other body which is attached to an agency and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the agency;

(l) a final proposal for the preparation of subordinate legislation;

(m) an interpretation, instruction or guideline of a type referred to in paragraph 31(1)(b), and a statement of policy or substantive rule of a type referred to in paragraph 32(1)(b); and

(n) a final decision, order or ruling of an officer of an agency made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the agency, whether or not that enactment or scheme provides for an appeal to be taken against that decision, order or ruling, and any reason which explains that decision, order or ruling, whether or not that reason:

(i) is contained in an internal memorandum of the agency or in a letter addressed by the agency to a named person; or

(ii) was given by the officer who made the decision, order or ruling or was incorporated by reference in his decision, order or ruling.

(3) **Disclosure after ten years.**—Subsection (1) does not apply to records brought into existence after the date of commencement of this Act which are more than ten years old.

**23. (1) National Defence and International Relations.**—An agency may refuse to disclose a record, for a period of ten years from its being brought into existence, where such disclosure could reasonably be expected to cause damage to the national defence or to international relations.

(2) **Exemption Period Extended.**—If the record

(a) was supplied to an agency by a foreign government or international organization on the understanding that the record would be kept confidential;

(b) contains exceptionally sensitive information, such as information relating to cryptography or details of defence strategies or military installations, or

(c) would endanger the life or physical safety of a person if disclosed,

the agency may refuse to disclose the record after the ten year period designated above.

**24. (1) Law Enforcement and Legal Proceedings.**—An agency may refuse to disclose a record the disclosure of which could have a substantial adverse impact on enforcement of the law, or the conduct of legal proceedings, but only to the extent that disclosure could reasonably be expected to:

(a) interfere with an enforcement proceeding;

(b) interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding could be reasonably expected to eventuate;

(c) reveal investigative techniques and procedures currently in use or likely to be used;

(d) disclose the identity of a confidential source of information, or disclose information furnished only by that confidential source;

- (e) endanger the life or physical safety of a law enforcement officer;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) reveal a record which has been confiscated from a person by an officer in accordance with an enactment;
- (h) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (i) facilitate the escape from custody of a person who is under lawful detention, or could otherwise be reasonably expected to jeopardize the security of a center for lawful detention; or
- (j) have a substantial adverse impact on the position of the government, an agency or an officer of an agency in legal proceedings in which the government, that agency or that officer is a party or is likely to be a party.

(2) **Records not to be Exempted.**—Subsection (1) shall be read, so far as possible, so as not to include a record of the following, or of a similar nature, namely:

- (a) a record revealing that the scope of any law enforcement investigation has exceeded the limits proposed by law;
- (b) a record revealing the use of illegal law enforcement techniques or procedures;
- (c) a record containing any general outline of the structure and programs of a law enforcement agency;
- (d) a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis;
- (e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law; and
- (f) a report on a law enforcement investigation where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.

**25. Personal Privacy and Public Interest.**—An agency may refuse to disclose

- (a) a record the disclosure of which would constitute an invasion of the privacy of a natural person which is unwarranted by the public interest to be served by the disclosure;
- (b) a record of information about a natural person supplied to an agency in confidence where disclosure would give rise to a justifiable fear that information of that type would no longer be supplied to the agency and it is in the public interest that information of that type continue to be supplied to the agency;
- (c) private letters and writings which are donated or delivered to the Public Archives or the National Library, except in accordance with the terms and conditions on which the letters were donated or delivered.
- (d) a record of the correspondence of a Minister or an agency with a person which reveals the identity of that person or which an agency or a Minister would be entitled to refuse to disclose under another provision of this Act.

**26. (1) Commercial and Financial Information.**—An agency may refuse to disclose a record which reveals a trade secret or other commercial or financial information, except for statistical aggregates, where such disclosure would reasonably be expected to

(a) have a substantial adverse effect on the legitimate economic interests of Canada, for instance,

(i) by revealing information relating to the currency or to the coinage or legal tender;

or

(ii) by revealing consideration of a contemplated movement in bank interest or tariff rates, in sales or excise tax, the imposition of credit controls, a sale or acquisition of land or property, urban re-zoning, or a like proposal; or

(iii) by impeding regulation or supervision of financial institutions, foreign investment, the stock exchange, or imports and exports;

(b) expose the agency or a commercial or financial enterprise, including a Crown Corporation, unreasonably to disadvantage in competitive activity or in a present or likely process of negotiation, a contractual arrangement or other similar process;

(c) result in undue gain or loss to a person, group, committee or financial institution or agency; or

(d) the information having been supplied to an agency in confidence, give rise to a justifiable fear that information of that type would no longer be supplied to the agency and it is in the public interest that information of that type continue to be supplied to an agency.

**(2) Industrial Privacy and Public Interest.**—An agency shall not under subsection (1) refuse to disclose a report on an industry where there is a clear public interest that supersedes the private interest, for example, the public interest in improved competition or in evaluating aspects of government regulation of trade practices or environmental controls.

**27. Statutory Exemption.**—An agency may refuse to disclose a record, the disclosure of which is prohibited by any statute, where the prohibition is stated to be applicable notwithstanding the provisions of this Act.

**28. (1) Severability.**—Where an agency receives a request for a record which contains both information which the agency is entitled under this Act to refuse to disclose and information which the agency is not entitled to refuse to disclose, the agency shall disclose any reasonably severable portion of such a record after deletion of the portion which the agency is entitled to refuse to disclose.

**(2) Exemptions and Public Interest.**—Notwithstanding the provisions of this Part, an agency may disclose a record which may otherwise be exempted under sections 21, 22, 23 or 24, if in the opinion of the head of the agency the public interest in disclosure and the interest of the person requesting the record outweigh the interests in non-disclosure.

## PART IV

### PUBLICATION OF INFORMATION

**29. Information re Agencies to be Published.**—The Governor in Council shall cause to be published annually a specification of all bodies which are agencies for the purpose of this Act and, in respect of each such agency, the following information pertaining to that agency, namely:

(a) the places at which a request for a record should be made;

- (b) the places at which the material referred to in sections 30, 31, 32, 34 which has been published by the agency may be purchased, and the places at which material referred to in sections 30, 32 and 34 which has not been published may be inspected and copied;
- (c) details of all boards, councils, committees and other bodies constituted by two (2) or more persons, which are a part of, or which have been established for the purpose of advising the agency, and whose meetings are open to the public, or whose minutes of such meetings are available for public inspection; and
- (d) whether the agency has a library or reading room which is available for public use, and if so, the address of such library or reading room.

**30. Information re Agency Organization and Operation.**—Subject to this Act, each agency shall, as soon as practicable, cause to be prepared, and either published and copies offered for sale to the public or made available for inspection and copying by members of the public at an office of the agency and at a government office or public library in each capital of a province or territory, a record containing the following information, namely:

- (a) a description of the organization and operating procedures of the agency, including the following particulars, namely:
  - (i) the functions of and the programs administered by each office, division or branch of the agency;
  - (ii) the general types of decisions made by each such office, division or branch in the exercise of any such function or in the administration of any such program;
  - (iii) the officers who have final authority to make any such decisions, and any delegation of that authority;
  - (iv) the formal and informal administrative procedures which are available for consultation with a member of the public or in the making of any such delegation; and
  - (v) the general course or method by which matters arising in the exercise of any function are initiated, processed, channeled and determined;
- (b) a list of the general classes or types of records prepared by or in the possession of the agency;
- (c) the position or rank, and official address of each Access Officer of the agency who has been designated under section 4(2) with responsibility to process a request for a record and, in respect of each such officer, the class of records in relation to which he has a responsibility; and
- (d) any alteration or modification to information referred to in paragraph (a), (b) or (c) which has been prepared and either published or made available in accordance with this section.

**31. (1) Agency Manuals to be published.**—Each agency shall cause to be promptly published and offered for sale to the public, any manual which has been prepared by that agency, whether before or after the commencement of this Act, and issued to officers of the agency and which contains the following information, namely:

- (a) interpretations of the provisions of any enactment or scheme administered by the agency, where those interpretations are to be applied by, or are to be guidelines for, any officer:
  - (i) who is determining any application by a person for a right, privilege or benefit which is conferred by any such enactment or scheme;
  - (ii) who is determining whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under any such enactment or scheme; or
  - (iii) who is determining whether to impose an obligation or liability on a person under any enactment or scheme; or

(b) instructions to, or guidelines for, officers of the agency on the procedures to be followed, the methods to be employed or the objectives to be pursued, in the administration or enforcement by such officers or the provisions of any enactment or scheme administered by the agency, where any member of the public might be directly affected by any such administration or enforcement.

(2) **Deletion of Exempted Records.**—In publishing a manual referred to in subsection (1), the agency may delete from that manual any record which the agency would be entitled to refuse to disclose under a provision of this Act other than subsection 22(1) if a request were made for a document containing that record but if a deletion is made the agency shall cause to be entered in the published copy of that manual a statement of the fact that a deletion has been made, the nature of the record which has been deleted and the provision of this Act under which the agency would be entitled to refuse to disclose a document containing that record.

(3) **Amendments, etc. to be published.**—An agency shall promptly publish and offer for sale particulars of any amendment, revision or other alteration made to a manual under this section.

**32. (1) Other Information to be made available.**—Without limiting the generality of section 31, each agency shall cause to be made available in accordance with subsection (2) any record which is brought into existence after 12 months from the date on which this Act receives royal assent and which contains an item of information, as follows:

(a) an interpretation, instruction or guideline referred to in paragraph 31(1)(a) or (b) which has been issued to officers of the agency other than in the form of a manual; or

(b) a statement of policy or substantive rule which has been adopted by the agency:

(i) whether or not that statement or rule is contained in an internal memorandum of the agency or in a letter addressed by the agency to a named person; and

(ii) which may affect members of the public in the administration or enforcement by the agency of a provision or an enactment or scheme administered by the agency, including an enactment or scheme under which the agency may impose any obligation or liability upon a person.

(2) **Information to be indexed.**—Each agency shall cause to be kept and either published and copies offered for sale to the public or made available for inspection and copying by members of the public at an office of the agency and at a government office or public library in each capital of a province or territory, an index of all documents referred to in subsection (1) which are not published, whether separately or in a publication containing other material, and copies offered for sale to the public, and any such index shall:

(a) contain a description of each such document or, if there are a large number of such documents containing identical subject matter, of each such class of document, which is sufficient to enable a person to identify the subject matter of and to frame an identifiable request for that document;

(b) apply to all such documents, except to the extent that a document cannot be indexed without the disclosure of information which an agency would be entitled to refuse to disclose if that information were contained in a document for which a request was made;

(c) be supplemented, at least once in each 6 months, with a list of the docu-

ments which have been brought into existence since the index was prepared or was last supplemented, as the case may be; and

(d) be made available for inspection and copying by members of the public at an office of the agency and at a designated office or public library in each capital city of a province or territory.

(3) **Statement or Rule Deemed Adopted.**—Without limiting the generality of paragraph (1)(b), a statement or rule shall be deemed to be adopted by an agency:

(a) if it has been adopted by an officer of the agency who is authorized, by the nature of his duty, to adopt any such statement or rule as being a statement or rule of the agency; and

(b) if it has been communicated in writing by an officer of the agency to a member of the public as the advice or opinion of the agency.

**33. (1) Agency Policy and Law Enforcement Records to be Indexed.**—The responsible Minister shall cause an index to be kept of the documents referred to in paragraphs 22(2)(b) to (l) and 24(2)(d) or (e), which are in the possession of the agency and are brought into existence after 12 months from the date on which this Act receives royal assent.

(2) An index referred to in subsection (1) shall:

(a) contain a description of each document to be listed in the index or, if the agency possesses a large number of inquiries, reports, studies, surveys or other such documents and the subject matter of those documents is of such similarity that a separate listing of each such document would be ineffectual, of each such class of document, which is sufficient to enable a person to identify the subject matter of and to frame an identifiable request for that document;

(b) apply to all documents referred to in paragraphs 22(2)(b) to (l) and 24(2)(d) and (e) except to the extent that the fact of a document's existence is itself a matter which an agency would be entitled to refuse to disclose if that fact were contained in a document for which a request was made;

(c) be supplemented, at least once in each 3 months, with a list of the documents which have come into the possession of the agency since the index was prepared or was last supplemented, as the case may be; and

(d) be published and copies offered for sale or be made available for inspection and copying by members of the public at an office of the agency and at a designated office or public library in each capital city of a Province or Territory.

**34. (1) Annual Report by Agency.**—Each agency shall as soon as practicable in each year prepare and furnish to the appropriate Minister a report on the operation of this Act in relation to that agency during the year.

(2) **Minister to lay Report before Commons.**—The Minister shall cause the report of the agency to be laid before the House of Commons within 15 sitting days of that House after the receipt of the report by the Minister.

(3) **Report to include.**—Each report by an agency shall include details of the following, namely:

(a) the number of requests for documents made under this Act received by the agency;

- (b) the number of decisions by the agency under subsections 7(4) or 7(6) to refuse to disclose a document, the provisions of this Act under which the agency refused to disclose those documents, and the number of occasions on which each such provision was invoked;
- (c) the number of applications under subsection 10(2) for review of a decision by the Information Commissioner to refuse to disclose a document, the number of applications under subsection 10(2) for review of a determination by the agency under subsection 8(1) of a fee payable, and in respect of each application for a review of a decision by the agency to refuse to disclose a document, the provision of this Act under which the agency refused to disclose that document;
- (d) the number of appeals to the Court under subsection 16(1) for review of a refusal by the agency to disclose a document, the number of appeals to the Court under subsection 16(1) for review of a determination by the agency under subsection 8(1) of a fee payable, and in respect of each application:
  - (i) the decision of the Court;
  - (ii) the amount of costs, if any, awarded by the Court against the Crown;
  - (iii) the details of any order made by the Court under paragraph 9(1)(b) or section 19; and
  - (iv) if the appeal was from a refusal by the agency to disclose a document—the provision of this Act under which the agency refused, or is deemed to have refused, to disclose that document;
- (e) the amount of fees collected by the agency under subsection 8(1);
- (f) any reading room or other facilities provided by the agency for the use of a person wishing to inspect or copy a document possessed by the agency, and the publications, documents or other information regularly on display in any such room or other facility; and
- (g) such other information as indicates an effort by the agency to administer and implement the spirit or intention of this Act.

THE NOVA SCOTIA FREEDOM OF INFORMATION ACT

An Act Respecting Access  
by the Public to Information  
on File with the Government

WHEREAS since 1848 the people of the Province of Nova Scotia have had responsible government whereby the members of the House of Assembly and the members of the Executive Council are responsible for their actions to the people who have elected them through regularly held elections;

AND WHEREAS the people of the Province should be protected from secrecy in respect of the conduct of public business by officials of the Government;

AND WHEREAS the principles recited herein should be consistent one with the other and should operate without contradiction;

AND WHEREAS these principles can be better maintained by assuring the people that the Government is operating openly and by providing to the people access to as much information in the hands of Government as possible without impeding the operation of Government or disclosing personal information pertaining to persons or matters other than the person desiring the information;

THEREFORE BE IT ENACTED by the Governor and Assembly as follows:

1 This Act may be cited as the Freedom of Information Act.

2 In this Act,

(a) "access" means either the opportunity to examine an original record or the provision of a copy, at the option of the Government;

(b) "applicant" means a person who makes a request pursuant to the Act;

(c) "denial" means the refusal by a department to provide access to information, to correct a record or to make a notation on a record upon a request being made pursuant to this Act;

(d) "department" means any department, board, commission, foundation, agency, association, or other body of persons, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors of which

(i) are appointed by an Act of the Legislature or by Order of the Governor in Council; or

(ii) if not so appointed, in the discharge of their duties are public officers or servants of the Crown, or for the proper discharge of their duties are, directly or indirectly, responsible to the Crown;

and "Government" has the same meaning;

(e) "Deputy Head" means the Deputy Minister or the senior administrative officer of a department;

(f) "information" means information in any form including information that is written, photographed, recorded or stored in any manner whatsoever and on file or in the possession or under the control of a department and includes personal information;

(g) "personal information" means information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health, physical or personal characteristics or mode of living;

(h) "record" means the form in which information is kept.

3 Every person shall be permitted access to information respecting

(a) organization of a department;

(b) administrative staff manuals and instructions to staff that affect a member of the public;

(c) rules of procedure;

(d) descriptions of forms available or places at which forms may be obtained;

(e) statements of general policy or interpretations of general applicability formulated and adopted by a department;

(f) final decisions of administrative tribunals;

(g) personal information contained in files pertaining to the person making the request;

- (h) the annual report and regulations of a department;
- (i) programs and policies of a department; and
- (j) each amendment, revision or repeal of the foregoing.

4 Notwithstanding Section 3, a person shall not be permitted access to information which

- (a) might reveal personal information concerning another person;
- (b) might result in financial gain or loss to a person or a department, or which might influence negotiations in progress leading to an agreement or contract;
- (c) would jeopardize the ability of a department to function on a competitive commercial basis;
- (d) might be injurious to relations with another government;
- (e) would be likely to disclose information obtained or prepared during the conduct of an investigation concerning alleged violations of any enactment or the administration of justice;
- (f) would be detrimental to the proper custody, control or supervision of persons under sentence;
- (g) would be likely to disclose legal opinions or advice provided to a department by a law officer of the Crown, or privileged communications between barrister and client in a matter of department business;
- (h) would be likely to disclose opinions or recommendations by public servants in matters for decision by a Minister or the Executive Council;
- (i) would be likely to disclose draft legislation or regulations;
- (j) would be likely to disclose information the confidentiality of which is protected by an enactment.

5 Nothing contained in Section 3 or 4 shall be interpreted to restrict or be deemed to be interpreted to restrict access to information provided to the public by custom or practice prior to the coming into force of this Act.

6(1) A person in respect of whom personal information is contained in a file by a department may

(a) request that the information be corrected and amended;

(b) request that the information contained in the file not be used or made available for any purpose other than the purpose for which it was provided without his consent;

(c) seek injunctive relief to correct or amend personal information on a file maintained by a department.

(2) A department maintaining personal information files shall

(a) not make the personal information contained therein available to another department or person for another purpose without the person's consent;

(b) maintain the records that are necessary and lawful, as well as current and accurate, and disclose the existence of all data banks and files it maintains containing the personal information;

(c) refrain from selling or renting a person's name or address for mailing list use without that person's permission;

(d) permit a person to have access at all reasonable times to the personal information respecting him contained in his file.

7 Where a department record contains some information which cannot be released, that portion of the record shall be deleted and the remainder shall be released.

8(1) Where a person applies for information which is published, the department may refer the applicant to the publication.

(2) Where a person applies for information which is required to be published or made public at a future date, the department may inform the applicant of this fact and the date or approximate date when the information will be available.

9(1) A person may obtain access to information by applying to the department where the information is kept either in person, by telephone or in writing.

(2) If access to information is not forthcoming as a result of an application pursuant to subsection (1) then a request for information may be made in accordance with Section 10.

10(1) A request for information shall be directed to the Deputy Head of the department where the information is kept.

(2) A request for information shall be in writing and shall identify the material requested precisely.

(3) A request for information shall be granted or denied within fifteen working days of the date of the receipt of the request.

(4) A request for information that is not granted within fifteen working days of the receipt of the request and which has not been denied in writing by the Deputy Head shall be and shall be deemed to be denied by the Deputy Head.

11 Every denial of a request for information shall be in writing, be signed by the Deputy Head and set forth:

(a) the reasons for the denial with appropriate references to the exemption involved; and

(b) a statement to the person requesting the information informing him that he has an appeal and the method and procedure of making such appeal.

12(1) Within fifteen days after his request is denied or is deemed to be denied, the applicant may in writing appeal the denial to the Minister.

(2) Within thirty days after receiving the request for review the Minister shall review the request for information and either affirm, vary or overrule the denial.

(3) If the Minister has varied or overruled the denial of the Deputy Head, then he shall issue appropriate instructions to ensure that the information requested or the portion allowable is made available to the person making the request.

13(1) Where a request for information has been denied by the Deputy Head and an appeal of that denial made to the Minister and the Minister has upheld that denial, the person to whom the information is denied may appeal to the House of Assembly.

(2) The appeal to the House of Assembly shall be presented by a member thereof making a motion in accordance with the Rules and Forms of Procedure of the House of Assembly for access by the

person requesting the information to the information requested and the motion shall be dealt with by the House in accordance with its said Rules and Forms of Procedure.

14 Nothing in this Act shall in any way alter procedures, fees or charges now provided in any enactment for obtaining access to or copies of information or for having personal information corrected or amended.

15(1) The Governor in Council may make regulations

(a) defining a request and providing a procedure for requesting access to information or requesting corrections on records or notations on records;

(b) prescribing fees or charges to be made for requests, access, corrections on records or notations on records;

(c) defining any word or words not defined in this Act;

(d) such other matters or things as are necessary to carry out the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) shall be regulations within the meaning of the Regulations Act.

16 This Act shall come into force on and not before such day as the Governor in Council orders and declares by proclamation.

## THE NEW BRUNSWICK RIGHT TO INFORMATION ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

### 1 In this Act

"appropriate Minister" means the Minister responsible for the administration of the department in which the information is kept or filed, and in the case where a minister is not responsible for the administration of a department, means the person responsible for such department in the Legislative Assembly;

"department" means

(a) any department of the Government of the Province;

(b) any Crown Agency or Crown Corporation;

(c) any other branch of the public service;

(d) any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund,

as set out in the regulations;

"document" includes any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise;

"information" means information contained in a document;

"personal information" means information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health, physical or personal characteristics or mode of living;

"public business" means any activity or function carried on or performed by a department.

### 2 Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province.

3(1) Any person may request information by applying to the minister of the department where the information is likely to be kept or filed, and the appropriate Minister shall in writing within thirty days of the receipt of the application grant or deny the request.

3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.

3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

3(4) Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.

4(1) Where a request for information is granted by an appropriate Minister or a judge of the Supreme Court, the appropriate Minister shall

(a) upon payment of the fee prescribed by regulation, allow the information to be inspected, and, at the discretion of the appropriate minister having regard to cost to be reproduced in whole or in part;

(b) where the information requested is published, refer the applicant to the publication, or

(c) if the information is to be published or is required to be published at a future date, inform the applicant of such fact and the approximate date of such publishing.

4(2) Where a portion of a document contains some information that is information referred to in section 6, and that portion is severable, that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted.

4(3) Where a request for information is granted, the information shall only be provided in the language or languages in which it was made.

4(4) When the document containing the information that is the subject matter of an application has been destroyed or does not exist, the appropriate Minister shall advise the applicant of such fact.

5(1) An appropriate Minister may only deny a request for information or a part thereof in accordance with subsection 4(4) and section 6 and where that Minister denies a request for information he shall, in writing, advise the applicant of the denial stating the reasons for such denial and shall provide the applicant with the necessary forms for a review under this Act.

6 There is no right to information under this Act where its release

(a) would disclose information the confidentiality of which is protected by law;

(b) would reveal personal information, given on a confidential basis, concerning another person;

(c) would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract;

(d) would violate the confidentiality of information obtained from another government;

(e) would be detrimental to the proper custody, control or supervision of persons under sentence;

(f) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

(g) would disclose opinions or recommendations by public servants for a Minister or the Executive Council;

(h) would disclose the substance of proposed legislation or regulations;

(i) would impede an investigation, inquiry or the administration of justice.

7(1) Where an applicant is not satisfied with the decision of an appropriate Minister or where an appropriate Minister fails to reply to a request within the time prescribed, the applicant may in the prescribed form and manner either

(a) refer the matter to a judge of the Supreme Court, or

(b) refer the matter to the Ombudsman.

7(2) Where the applicant refers the matter to a judge of the Supreme Court under subsection (1),

(a) the applicant may not thereafter refer the matter to the Ombudsman under paragraph (1)(b) or under the Ombudsman Act, and

(b) the Ombudsman, in such case, may not act under the authority of this Act or the Ombudsman Act with respect to that matter.

7(3) Where the applicant refers the matter to the Ombudsman under subsection (1), the applicant may not, subject to subsection 11(1), refer the matter to a judge of the Supreme Court.

7(4) The Ombudsman, subject to section 19 of the Ombudsman Act, and a Supreme Court judge may, with respect to any matter referred to them, inspect the information that is the subject matter of the referral, if such information exists, in order to determine the referral, but such inspection shall be made in camera without the presence of any person.

8(1) A Supreme Court judge shall upon the applicant's request hold a hearing, and

(a) in the case where a minister denied the request for information or a part thereof, may order the minister to grant the request in whole or in part;

(b) in the case where the minister failed to reply to a request, shall order that the appropriate Minister,

(i) grant the request, or

(ii) deny the request;

(c) may make any other order that is appropriate.

8(2) A copy of the decision of the Supreme Court judge shall be sent to the applicant and the appropriate Minister.

8(3) No appeal lies from the decision of a Supreme Court judge under subsection (1).

9 The Ombudsman shall in accordance with this Act and the power, authority, privileges, rights and duties vested in him under the Ombudsman Act review the matter referred to him within thirty days of having received the referral.

10(1) Upon having reviewed the matter referred to him, the Ombudsman shall forthwith, in writing, advise the appropriate Minister of his recommendation and shall forward a copy of such recommendation to the person making the referral.

10(2) The Ombudsman may in such recommendation

(a) recommend to the appropriate Minister to grant the request in whole or in part;

(b) in the case where the appropriate Minister failed to reply to a request, recommend to the appropriate Minister

(i) to grant the request, or

(ii) to deny the request.

10(3) The appropriate Minister referred to in subsection (2) shall, upon reviewing the recommendation of the Ombudsman, carry out the recommendations of the Ombudsman or make such other decision as he thinks fit and upon making his decision, that Minister shall notify, in writing, the person making the referral and shall forward to the Ombudsman a copy of such decision.

11(1) Where the person making the referral is not satisfied with the decision of the appropriate Minister under subsection 10(3), that person may appeal the matter to a judge of the Supreme Court.

11(2) Subsection 7(4) and section 8 apply mutatis mutandis to an appeal made under subsection (1).

12 In any proceeding under this Act, the onus shall be on the Minister to show that there is no right to the information that is the subject of the proceeding.

13 Where a matter is referred or appealed to a judge of the Supreme Court, the judge shall award costs in favour of the applicant

(a) where the applicant is successful, or

(b) where the applicant is not successful, if the judge considers it to be in the public interest.

14 The Lieutenant-Governor in Council may make regulations

(a) prescribing the form and manner of referrals under this Act;

(b) prescribing forms;

- (c) prescribing the departments for the purposes of this Act;
- (d) prescribing fees for the purposes of this Act;
- (e) prescribing such other procedures as may be necessary to carry out the intent and purposes of this Act.

15 This Act is subject to review by the Legislative Assembly after thirty months following the coming into force of this Act.

16 This Act or any provision thereof comes into force on a day to be fixed by proclamation.

## B. UNITED STATES

### THE FREEDOM OF INFORMATION ACT

#### § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency

determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon

any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of

records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

## THE GOVERNMENT IN THE SUNSHINE ACT

### § 552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a

clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action.

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate

vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection

ings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for

information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the

public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the

defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any

agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

## C. AUSTRALIA

### MINORITY REPORT BILL (MRB) (PARTS IV AND V)

#### PART IV—PUBLICATION OF INFORMATION

22. The Minister responsible from time to time for publishing the *Australian Government Directory* or, if the *Directory* is not currently being published, any publication which has replaced the *Directory*, shall cause to be published in each annual edition of the *Directory* or other publication a specification of all bodies which are agencies for the purposes of this Act and, in respect of each such agency, the following information pertaining to that agency, namely:

- (a) the officers to whom and the places at which a request for a document should be made;
- (b) the places at which material referred to in sections 23, 24, 25 and 28 which has been published by the agency may be purchased, and the places at which material referred to in section 23, 25 and 28 which has not been published may be inspected and copied;
- (c) details of all boards, councils, committees and other bodies constituted by 2 or more persons, which are a part of, or which have been established for the purpose of advising, the agency, and whose meetings are open to the public, or whose minutes of such meetings are available for public inspection; and
- (d) whether the agency has a library or reading room which is available for public use, and if so, the address of such library or reading room.

23. Subject to this Act, the responsible Minister of each Department and the principal officer of each prescribed authority shall, as soon as is practicable, cause to be prepared, and either published and copies offered for sale to the public or made available for inspection and copying by members of the public at an office of the agency and at a Government office or public library in each capital city of a State or Territory of Australia, a document containing the following information, namely:

- (a) a description of the organisation and operating procedures of the agency, including the following particulars, namely:
  - (i) the functions of and the programs administered by each office, division or branch of the agency;
  - (ii) the general types of decisions made by each such office, division or branch in the exercise of any such function or in the administration of any such program;
  - (iii) the officers who have final authority to make any such decisions, and any delegation of that authority;
  - (iv) the formal and informal administrative procedures which are available for consultation with a member of the public in the making of any such decision; and
  - (v) the general course or method by which matters arising in the exercise of any function are initiated, processed, channeled and determined;

- (b) a list of the general classes or types of documents prepared by or in the possession of the agency;
- (c) the name, position or rank, and official address of each officer of the agency who has been designated under sub-section 8 (1) with responsibility to process a request for a document and, in respect of each such officer, the class of documents in relation to which he has such a responsibility; and
- (d) any alteration or modification to information referred to in paragraph (a), (b) or (c) which has been prepared and either published or made available in accordance with this section.

24. (1) The responsible Minister of each Department and the principal officer of each prescribed authority shall cause to be promptly published and offered for sale to the public, any manual which has been prepared by that agency, whether before or after the commencement of this Act, and issued to officers of that agency and which contains the following information, namely:

- (a) interpretations of the provisions of any enactment or scheme administered by the agency, where those interpretations are to be applied by, or are to be guideline for, any officer:
  - (i) who is determining any application by a person for a right, privilege or benefit which is conferred by any such enactment or scheme;
  - (ii) who is determining whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under any such enactment or scheme; or
  - (iii) who is determining whether to impose an obligation or liability on a person under any such enactment or scheme; or
- (b) instructions to, or guidelines for, officers of the agency on the procedures to be followed, the methods to be employed or the objectives to be pursued, in the administration or enforcement by such officers of the provisions of any enactment or scheme administered by the agency, where any member of the public might be directly affected by any such administration or enforcement.

(2) In publishing a manual referred to in sub-section (1), the responsible Minister or the principal officer, as the case may be, may delete from that manual any information which the agency would be entitled to refuse to disclose under a provision of this Act other than sub-section 31 (1) if a request were made for a document containing that information, but if a deletion is made the responsible Minister or the principal officer, whichever is appropriate, shall cause to be entered in the published copy of the manual a statement of the fact that a deletion has been made, the nature of the information which has been deleted and the provision of this Act under which the agency would be entitled to refuse to disclose a document containing that information.

(3) An agency shall promptly publish and offer for sale particulars of any amendment, revision or other alteration made to a manual under this section.

25. (1) Without limiting the generality of section 24, the responsible Minister of each Department and the principal officer of each prescribed authority shall cause to be made available in accordance with sub-section (2) any document which is brought into existence after 12 months from the date on which this Act receives the Royal Assent and which contains an item of information, as follows:

- (a) an interpretation, instruction or guideline referred to in paragraph 24 (1) (a) or (b) which has been issued to officers of the agency other than in the form of a manual; or
- (b) a statement of policy or substantive rule which has been adopted by the agency:
  - (i) whether or not that statement or rule is contained in an internal memorandum of the agency or in a letter addressed by the agency to a named person; and
  - (ii) which may affect members of the public in the administration or enforcement by the agency of a provision of an enactment or scheme administered by the agency, including an enactment or scheme under which the agency may impose any obligation or liability upon a person.

(2) The responsible Minister of each Department and the principal officer of each prescribed authority shall cause an index to be kept of all documents referred to in sub-section (1) which are not published, whether separately or in a publication containing other material, and copies offered for sale to the public, and any such index shall:

- (a) contain a description of each such document or, if there are a large number of such documents containing identical subject matter, of each such class of document, which is sufficient to enable a person to identify the subject matter of and to frame an identifiable request for that document;
- (b) apply to all such documents, except to the extent that a document cannot be indexed without the disclosure of information which an agency would be entitled to refuse to disclose if that information were contained in a document for which a request was made;
- (c) be supplemented, at least once in each 6 months, with a list of the documents which have been brought into existence since the index was prepared or was last supplemented, as the case may be; and
- (d) be made available for inspection and copying by members of the public at an office of the agency and at a Government office or public library in each capital city of a State or Territory of Australia.

(3) Without limiting the generality of paragraph (1) (b), a statement or rule shall be deemed to be adopted by an agency:

- (a) if it has been adopted by an officer of the agency who is authorised, by the nature of his duty, to adopt any such statement or rule as being a statement or rule of the agency; and
- (b) if it has been communicated in writing by an officer of the agency to a member of the public as the advice or opinion of the agency.

26. (1) The Prime Minister shall cause a register to be kept and made available for inspection and copying by members of the public containing details of all decisions made by the Cabinet after the date of commencement of this Act, the Cabinet number assigned to each such decision, and the date on which the decision was made.

(2) The details of a decision, other than the Cabinet number assigned to it and the date on which it was made, may be entered on the register at the discretion of the Prime Minister.

27. The Secretary of the Defence, Press and Broadcasting Committee shall cause a register to be kept and made available for inspection by members of the public containing the names of the members of the Committee and details of all 'D' notices which are currently in force, all 'D' notices which are issued after the date of commencement of this Act, and the date on which any such notice was or is issued, as the case may be.

28. (1) The responsible Minister of each Department and the principal officer of each prescribed authority shall cause an index to be kept of the documents referred to in paragraphs 31 (2) (b)-(n) and 35 (2) (d) or (e), which are in the possession of the agency and are brought into existence after 12 months from the date on which this Act receives the Royal Assent.

(2) An index referred to in sub-section (1) shall:

- (a) contain a description of each document to be listed in the index or, if the agency possesses a large number of inquiries, reports, studies, surveys or other such documents and the subject matter of those documents is of such similarity that a separate listing of each such document would be inefficient, of each such class of document, which is sufficient to enable a person to identify the subject matter of and to frame an identifiable request for that document;
- (b) apply to all documents referred to in paragraphs 31 (2) (b)-(n) and 35 (2) (d) and (e) except to the extent that the fact of a document's existence is itself a matter which an agency would be entitled to refuse to disclose if that fact were contained in a document for which a request was made;
- (c) be supplemented, at least once in each 3 months, with a list of the documents which have come into the possession of the agency since the index was prepared or was last supplemented, as the case may be; and
- (d) be published and copies offered for sale or be made available for inspection and copying by members of the public at an office of the agency and at a Government office or public library in each capital city of a State or Territory of Australia.

## PART V—EXEMPTIONS

29. (1) An agency shall not, unless otherwise directed by the responsible Minister, disclose a Cabinet document, as follows:

- (a) a record of the deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
- (b) a record of a briefing to a Minister in relation to a matter before Cabinet or a Committee of the Cabinet, other than a completed proposal or submission which has been prepared after the date of commencement of this Act by the officers of an agency (other than the responsible Minister) for presentation to the Cabinet or to a Committee of the Cabinet;
- (c) a document containing a policy or proposal which has been prepared by a Minister for presentation to the Cabinet or to a Committee of the Cabinet; or
- (d) a record of a consultation between Ministers on a matter relating to Government policy.

(2) Sub-section (1) does not apply to Cabinet documents brought into existence after the date of commencement of this Act which are more than 10 years old.

30. (1) An agency may refuse to disclose a document which relates to the national defence where:

- (a) if the document was brought into existence before the expiration of 12 months from the date on which this Act receives the Royal Assent and the document is not classified in accordance with sub-section (2)—disclosure of the document could be reasonably expected to cause damage to the national defence; or
- (b) in any other case—the document is properly classified in accordance with sub-section (2).

(2) The Prime Minister shall, within 12 months from the date on which this Act receives the Royal Assent, cause an instruction manual to be issued relating to the classification of documents the disclosure of which, whether separately or in combination with other such documents, could be reasonably expected to cause damage to the national defence, but so as to ensure:

- (a) that the defence classifications which are designated shall be distinct from classifications used by agencies for marking documents other than documents relating to the national defence;
- (b) that the defence classifications shall be as follows, namely:
  - (i) 'Top Secret', for documents the unauthorised disclosure of which could be reasonably expected to cause exceptionally grave damage to the national defence;
  - (ii) 'Secret', for documents the unauthorised disclosure of which could be reasonably expected to cause serious damage to the national defence; and
  - (iii) 'Confidential', for documents the unauthorised disclosure of which could be reasonably expected to cause damage to the national defence;
- (c) that, with respect to each of the defence classifications referred to in paragraph (2) (b), the agencies with authority to mark such a classification on a document shall be listed in the instruction manual;
- (d) that the number of officers who have authority to mark a defence classification on a document shall be limited to the minimum number required for efficient administration, and each such officer shall be authorised in writing signed by the responsible Minister, if the agency is a Department, by the principal officer, if the agency is a prescribed authority, or by an officer to whom the responsible Minister or the principal officer, as the case may be, has by instrument in writing delegated the power of authorisation, and any authorisation shall specify which of the defence classifications the officer is authorised to mark upon a document;
- (e) that each defence classification marked on a document shall state the date on which the document was classified, the name of the officer who marked that defence classification on the document and, where practicable, the portions of the document to which the classification mark applies;

- (f) that, subject to paragraph (g), a document marked 'Top Secret' shall be declassified within 10 years from the date on which the document was classified, a document marked 'Secret' shall be declassified within 8 years from the date on which the document was classified, and a document marked 'Confidential' shall be declassified within 6 years from the date on which the document was classified;
- (g) that an officer who has authority to mark a document 'Top Secret' may, at the time a defence classification is being marked on a document, authorise that a statement accompany that mark to the effect that the document may remain classified for a period which is designated and which is longer than 10 years, if the document:
  - (i) was supplied to an agency by a foreign government or international organisation on the understanding that the document would be kept confidential;
  - (ii) contains exceptionally sensitive information, such as information relating to cryptography or details of defence strategies or military installations; or
  - (iii) would endanger the life or physical safety of a person if disclosed;
- (h) that a defence classification referred to in paragraph (g) shall, after the classification is 10 years old, be reviewed by an officer with authority to mark a document 'Top Secret' whenever a request is received from a person or another agency to inspect or copy that document; and
- (i) that every document bearing a defence classification shall be automatically declassified after 30 years from the date on which the document was classified, unless the responsible Minister or the principal officer, as the case may be, personally determines in writing at that time that continued classification is necessary in the interests of the national defence and designates the period for which the document will remain classified.

31. (1) An agency may refuse to disclose a document which has been prepared by an officer of an agency and which contains an opinion, advice or a recommendation of an officer submitted to an agency for consideration in the performance of any function leading to the making of a decision or the formulation of a policy.

(2) In any case where an agency would otherwise be entitled under sub-section (1) to refuse to disclose a document of the following or of a similar nature, an agency shall not refuse to disclose such a document under sub-section (1) unless conditions exist at that time under which the making of a decision or the implementation of a policy would be unreasonably impeded by disclosure of that document, namely:

- (a) a document which mainly contains factual material;
- (b) a statistical survey;
- (c) a report by a valuer, whether or not the valuer is an officer of the agency;
- (d) an environmental impact statement prepared in accordance with administrative procedures approved by the Governor-General under the *Environment and Protection (Impact and Proposals) Act 1975-75*;
- (e) a report of a test carried out on a product for the purpose of Government equipment purchasing;

- (f) a report or study on the performance or efficiency of an agency, or of an office, division or branch of an agency, whether the report or study is of a general nature or is in respect of a particular policy or program;
- (g) a feasibility or other technical study, including a cost estimate, relating to a proposed Government policy or project;
- (h) a report containing the results of field research undertaken preliminary to the formulation of a policy proposal;
- (i) a report of the Bureau of Agricultural Economics, the Bureau of Mineral Resources, the Bureau of Transport Economics, or of a similar investigatory body within an agency;
- (j) a final plan or proposal for the reorganisation of the function of an agency or for the establishment of a new program, including a budgetary estimate for that program, whether or not the plan or proposal is subject to approval;
- (k) a report of an inter-departmental committee, task force or similar body, or of a committee or task force within an agency, which has been established for the purpose of preparing a report on a particular topic;
- (l) a report of a committee, council or other body which is attached to an agency and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the agency;
- (m) a final proposal for the preparation of subordinate legislation;
- (n) a completed proposal or submission, other than a budgetary proposal, which has been prepared after the date of commencement of this Act by the officers of an agency (other than the responsible Minister) for presentation to the Cabinet or to a Committee of the Cabinet;
- (o) an interpretation, instruction or guideline of a type referred to in paragraph 25 (1) (a), and a statement of policy or substantive rule of a type referred to in paragraph 25 (1) (b); and
- (p) a final decision, order or ruling of an officer of an agency made during or at the conclusion of the exercise of a discretionary power conferred by or under an enactment or scheme administered by the agency, whether or not that enactment or scheme provides for an appeal to be taken against that decision, order or ruling, and any reason which explains that decision, order or ruling, whether or not that reason:
  - (i) is contained in an internal memorandum of the agency or in a letter addressed by the agency to a named person; or
  - (ii) was given by the officer who made the decision, order or ruling or was incorporated by reference in his decision, order or ruling.

(3) Sub-section (1) does not apply to documents brought into existence after the date of commencement of this Act which are more than 10 years old.

32. (1) An agency may refuse to disclose a document which reveals information acquired from a commercial or financial institution if—

- (a) the information is a trade secret or other commercial or financial information; and
- (b) disclosure would expose the institution unreasonably to disadvantage.

(2) In deciding whether disclosure would expose an institution unreasonably to disadvantage, the agency shall consider and take account of the following considerations namely:

- (a) whether the information is generally available to competitors of the institution;
- (b) whether the agency would be entitled to refuse to disclose the information under this Act if the information were generated by an agency;
- (c) whether the information could be disclosed without any substantial adverse impact on the competitive activities of the institution; and
- (d) whether there are any compelling public considerations in favour of disclosure which outweigh any competitive disadvantage to the institution, for instance, the public interest in improved competition or in evaluating aspects of government regulation of trade practices or environmental controls.

33. (1) An agency may refuse to disclose a document which reveals information supplied to the agency on a confidential basis where:

- (a) the agency would be entitled to refuse to disclose the information under this Act if the information were generated by an agency; or
- (b) disclosure would give rise to a justifiable fear that information of that type would no longer be supplied to the agency and it is in the public interest that information of that type continue to be supplied to the agency.

(2) Sub-section (1) does not apply to information supplied by another agency, or to trade secrets or other commercial or financial information acquired from a commercial or financial institution.

(3) Private letters and writings which are donated or delivered to the Australian Archives or the National Library shall only be disclosed in accordance with the terms and conditions on which the letters or writings were donated or delivered.

34. (1) An agency may refuse to disclose a document the disclosure of which would constitute an unwarranted invasion of personal privacy.

(2) In this section 'personal privacy' means the privacy of a natural person and does not include the privacy of a body.

35. (1) An agency may refuse to disclose a document the disclosure of which could have a substantial adverse impact on enforcement of the law, but only to the extent that disclosure could be reasonably expected to:

- (a) interfere with an enforcement proceeding;
- (b) interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding might be reasonably expected to eventuate;
- (c) reveal investigative techniques and procedures currently in use or likely to be used;
- (d) disclose the identity of a confidential source of information, or disclose information furnished only by that confidential source;
- (e) endanger the life or physical safety of a law enforcement officer;
- (f) deprive a person of a fair trial; or
- (g) constitute an unwarranted invasion of privacy.

(2) Sub-section (1) shall be read, so far as possible, so as not to include a document of the following, or of a similar nature, namely:

- (a) a document revealing that the scope of any law enforcement investigation has exceeded the limits imposed by law;
- (b) a document revealing the use of illegal law enforcement techniques or procedures;
- (c) a document containing any general outline of the structure and programs of a law enforcement agency;
- (d) a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis;
- (e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law; and
- (f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.

36. An agency may refuse to disclose a document as follows:

- (a) a document the premature disclosure of which could be reasonably expected to have a substantial adverse affect on the legitimate economic interests of Australia, for instance, by revealing consideration of a contemplated movement in Bank, interest or tariff rates, in sales or excise tax, the imposition of credit controls, a sale or acquisition of land or property, urban re-zoning, or a like proposal, or by impeding supervision of foreign investment or the stock exchange, or control of imports and exports;
- (b) a document containing sensitive information relating to the currency or to the coinage or legal tender;
- (c) a document containing a trade secret of an agency or, in the case of an agency engaged in trade or commerce, commercial or financial information that would expose the agency unreasonably to disadvantage;
- (d) a document containing the results of scientific research undertaken by an agency, where the research project or that part of a research project to which the results relate is not yet complete or where the agency intends to sell the results of the research;
- (e) a document containing information generated by an agency relating to the regulation or supervision of financial institutions, in so far as disclosure might result in unwarranted harm to the economy;
- (f) a document containing instructions to officers of an agency on the procedures to be followed and the criteria to be applied in negotiation, including financial, commercial, labour, and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest;
- (g) a contract tender where the contract is yet to be awarded;
- (h) an examination paper, or a comparable document, until such time as the use or uses for which the document was prepared have been completed;
- (i) a confidential report on a person prepared by an officer for social welfare,

employment or personnel management purposes, adoption or custody proceedings, in relation to the grant of a licence, award of a contract or conferral of a similar privilege or benefit, or in a confidential report of a comparable nature;

- (j) a document the disclosure of which could be reasonably expected to have a substantial adverse impact on the position of the Government, an agency or an officer of an agency in legal proceedings in which the Government, that agency or that officer is a party or is likely to be a party;
- (k) a document which has been confiscated from a person by an officer in accordance with an enactment;
- (l) a document the disclosure of which could be reasonably expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (m) a document the disclosure of which could be reasonably expected to facilitate the escape from custody of a person who is under lawful detention or could otherwise be reasonably expected to jeopardise the security of a centre for lawful detention;
- (n) a document containing information relating to the identity of the natural parents of a child who has been adopted or has been placed in the control of a person or institution other than his natural parents, or relating to the identity of any person who has adopted or has otherwise been placed in control of such a child or a document containing information as to the whereabouts of such a child; and
- (o) a document the unauthorised disclosure of which is prohibited by an enactment specified in the Second Schedule.

37. Where an agency receives a request for a document which contains both information which the agency is entitled under this Act to refuse to disclose and information which the agency is not entitled to refuse to disclose, the agency shall disclose any reasonably severable portion of such a document after deletion of the portion which the agency is entitled to refuse to disclose.

PART II—PUBLICATION OF CERTAIN DOCUMENTS  
AND INFORMATION

6. (1) The responsible Minister of an agency shall—

(a) cause to be published, as soon as practicable after the commencement of this Part but not later than 12 months after that commencement, in a form approved by the Minister administering this Act—

(i) a statement setting out particulars of the organization and functions of the agency, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representations by, bodies and persons outside the Commonwealth administration in relation to the formulation of policy in, or the administration of, the agency; and

(ii) a statement of the categories of documents that are maintained in the possession of the agency; and

(b) within 12 months after the publication, in respect of the agency, of the statement under sub-paragraph (i) or (ii) of paragraph (a) that is the first statement published under that sub-paragraph, and thereafter at intervals of not more than 12 months, cause to be published statements bringing up to date the information contained in the previous statement or statements published under that sub-paragraph.

(2) A form approved by the Minister under sub-section (1) shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III.

(3) The information to be published in accordance with this section may be published by including it in the publication known as the Commonwealth Government Directory.

(4) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

(5) Sub-section (1) applies in relation to an agency that comes into existence after the commencement of this Part as if the references in that sub-section to the commencement of this Part were references to the day on which the agency comes into existence.

7. (1) This section applies, in respect of an agency, to documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or

other detriments, to or for which persons are or may be entitled or subject, being—

- (a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or
- (b) documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

(2) The principal officer of an agency shall—

- (a) cause copies of all documents to which this section applies in respect of the agency that are in use from time to time to be made available for inspection and for purchase by members of the public;
- (b) not later than 12 months after the commencement of this Part, cause to be published in the *Gazette* a statement (which may take the form of an index) specifying the documents of which copies are, at the time of preparation of the statement, so available and the place or places where copies may be inspected and may be purchased; and
- (c) within 12 months after the publication of the statement under paragraph (b) and thereafter at intervals of not more than 12 months, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements.

(3) The principal officer is not required to comply fully with paragraph (2) (a) before the expiration of 12 months after the date of commencement of this Part, but shall, before that time, comply with that paragraph so far as is practicable.

(4) This section does not require a document of the kind referred to in sub-section (1) containing exempt matter to be made available in accordance with sub-section (2), but, if such a document is not so made available, the principal officer of the agency shall, if practicable, cause to be prepared a corresponding document, altered only to the extent necessary to exclude the exempt matter, and cause the document so prepared to be dealt with in accordance with sub-section (2).

(5) Sub-sections (2) and (3) apply in relation to an agency that comes into existence after the commencement of this Part as if the references in those sub-sections to the commencement of this Part were references to the day on which the agency comes into existence.

(6) In this section, “enactment” includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

8. If a document required to be made available in accordance with section 7, being a document containing a rule, guideline or practice relating to a function of an agency, was not made available, and included in a statement in the *Gazette*, as referred to in that section, before the time (being more than 12 months after the date of commencement of this Part or the day on which the agency came into existence, whichever is the later) at which a person did, or omitted to do, any act or thing relevant to the performance of that function in relation to him (whether or not the time allowed for publication of a statement in respect of the document had expired before that time), that person, if he was not aware of that rule, guideline or practice at that time, shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice.

#### PART IV—EXEMPT DOCUMENTS

23. (1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure—

(a) would prejudice—

- (i) the security of the Commonwealth;
- (ii) the defence of the Commonwealth;
- (iii) the international relations of the Commonwealth; or
- (iv) relations between the Commonwealth and any State; or

(b) would divulge any information or matter communicated in confidence by or on behalf of the Government of another country or of a State to the Government of the Commonwealth or a person receiving the communication on behalf of that Government.

(2) Where a Minister is satisfied that the disclosure under this Act of a document would be contrary to the public interest for a reason referred to in sub-section (1), he may sign a certificate to that effect and such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document referred to in sub-section (1).

(3) Where a Minister is satisfied as mentioned in sub-section (2) by reason only of matter contained in a particular part or particular parts of a document, a certificate under that sub-section in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) The responsible Minister of an agency may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to the principal officer of the agency his powers under this section in respect of documents of the agency.

(5) A power delegated under sub-section (4), when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the responsible Minister.

(6) A delegation under sub-section (4) does not prevent the exercise of a power by the responsible Minister.

**24.** (1) A document is an exempt document if it is—

- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Cabinet;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

(5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

**25.** (1) A document is an exempt document if it is—

- (a) a document that has been submitted to the Executive Council for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Executive Council;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
- (d) a document the disclosure of which would involve the disclosure of any deliberation or advice of the Executive Council, other than a document by which an act of the Governor-General, acting with the advice of the Executive Council, was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Executive Council, or a person performing the duties of the Secretary, certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Executive Council for its consideration, or is proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Executive Council.

**26.** (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and

(b) would be contrary to the public interest.

(2) In the case of a document of the kind referred to in sub-section 7 (1), the matter referred to in paragraph (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).

(3) This section does not apply to a document by reason only of purely factual material contained in the document.

(4) This section does not apply to—

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a prescribed body or organization established within an agency; or

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

(5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 22 shall state the ground of public interest on which the decision is based.

27. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

- (a) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance;
- (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
- (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (e) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement.

28. (1) A document is an exempt document if it is a document to which a prescribed provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies.

(2) In this section, “enactment” includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

29. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse effect on the financial, property or staff management interests of the Commonwealth or of an agency or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency.

30. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

(2) Subject to sub-section (3), the provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or Minister may

direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a medical practitioner to be nominated by him.

**31.** (1) A document is an exempt document if its disclosure under this Act would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of an agency in or in relation to pending or likely legal proceedings.

(2) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(3) A document of the kind referred to in sub-section 7 (1) is not an exempt document by virtue of sub-section (2) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).

**32.** (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking, and—

- (a) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage; or
- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

(2) The provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of information concerning that person in respect of his business or professional affairs or of information concerning a business, commercial or financial undertaking of which that person, or a person on whose behalf that person made the request, is the proprietor.

**33.** A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

**34.** A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

35. A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown—

- (a) be in contempt of court;
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or
- (c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

36. (1) Where the Attorney-General is satisfied that the disclosure under this Act of a particular document, or of any document included in a particular class of documents, would be contrary to the public interest on a particular ground, being a ground that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the contents of the document, or of a document included in that class, as the case may be, should not be disclosed, he may sign a certificate that he is so satisfied, specifying in the certificate the ground concerned, and, while such a certificate is in force, but subject to Part V, the document, or every document included in that class, as the case may be, is an exempt document.

(2) A certificate under sub-section (1) in relation to a particular document shall be deemed to refer also to every document that is substantially identical to that document.

#### PART V—REVIEW OF DECISIONS

37. (1) Application may be made to the Administrative Appeals Tribunal for review of a decision refusing to grant access to a document in accordance with a request or deferring the provision of access to a document.

(2) Subject to sub-section (3), in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and any decision of the Attorney-General to give a certificate under section 36 that is applicable to the document and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

(3) Where, in proceedings under this section, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

(4) The powers of the Tribunal do not extend to reviewing a decision of an agency or Minister, for the purposes of sub-section 26 (1), that the disclosure of a document would be contrary to the public interest.

(5) Where, under a provision of Part IV, it is provided that a certificate of a specified kind establishes conclusively, for the purposes of this Act, that a document is an exempt document and such a certificate has been given in respect of a document, the powers of the Tribunal do not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate.

(6) The powers of the Tribunal under this section extend to matters relating to charges payable under this Act in relation to a request.

**38.** (1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency (not being a decision on a review under this section), the applicant may, within 28 days after the day on which notice of the decision was given to the applicant in accordance with section 22, apply to the principal officer of the agency for a review of the decision in accordance with this section.

(2) A person is not entitled to apply to the Tribunal for a review of a decision in relation to which sub-section (1) applies unless—

- (a) he has made an application under that sub-section in relation to the decision; and
- (b) he has been informed of the result of the review or a period of 14 days has elapsed since the day on which he made that application.

(3) Where an application for a review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorized by him to conduct such reviews to review the decision and to make a fresh decision on the original application.

(4) Where—

- (a) an application for a review of a decision has been made in accordance with sub-section (1); and
  - (b) the applicant has not been informed of the result of the review within 14 days after the day on which he made that application,
- an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975* if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

**39.** (1) Subject to this section, where—

- (a) a request has been made to an agency or Minister in accordance with section 17;
- (b) a period of 60 days has elapsed since the day on which the request was received by or on behalf of the agency or Minister; and
- (c) notice of a decision on the request has not been received by the applicant.

the principal officer of the agency or the Minister shall, for the purpose of enabling an application to be made to the Tribunal under section 37, be deemed to have made, on the last day of that period, a decision refusing to grant access to the document.

(2) Where a complaint is made to the Ombudsman under the *Ombudsman Act* 1976 concerning failure to make and notify to the applicant a decision on a request (whether the complaint was made before or after the expiration of the period referred to in sub-section (1)), an application to the Tribunal under section 37 of this Act by virtue of this section shall not be made before the Ombudsman has informed the applicant of the result of the complaint in accordance with section 12 of the *Ombudsman Act* 1976.

(3) Where such a complaint is made before the expiration of the period referred to in sub-section (1), the Ombudsman, after having investigated the complaint, may, if he is of the opinion that there has been unreasonable delay by an agency in connexion with the request, grant to the applicant a certificate certifying that he is of that opinion, and, if the Ombudsman does so, the principal officer of the agency or the Minister, as the case requires, shall, for the purposes of enabling application to be made to the Tribunal under section 37, be deemed to have made, on the date on which the certificate is granted, a decision refusing to grant access to the document.

(4) The Ombudsman shall not grant a certificate under sub-section (3) where the request to which the complaint relates was made to, or has been referred to, a Minister and is awaiting decision by him.

(5) Where, after an application has been made to the Tribunal by virtue of this section but before the Tribunal has finally dealt with the application, a decision, other than a decision to grant, without deferment, access to the document in accordance with the request, is given, the Tribunal may, at the request of the applicant, treat the proceedings as extending to a review of that decision in accordance with this Part.

(6) Before dealing further with an application made by virtue of this section, the Tribunal may, on the application of the agency or Minister concerned, allow further time to the agency or Minister to deal with the request.

**40.** For the purposes of this Part and of the application of the *Administrative Appeals Tribunal Act* 1975 in respect of proceedings under this Part—

- (a) a decision given by a person on behalf of an agency shall be deemed to have been given by the agency; and
- (b) in the case of proceedings by virtue of section 39, the agency or Minister to which or to whom the request was made shall be a party to the proceedings.

**41.** In proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.

**42.** Where, in relation to a request, the applicant has been given a notice in writing complying with section 22, section 28 of the *Administrative Appeals Tribunal Act* 1975 does not apply to the decision on that request.

**43.** In proceedings under this Part, the Tribunal shall make such order under sub-section 35 (2) of the *Administrative Appeals Tribunal Act* 1975 as it thinks necessary having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant, in the proceedings, of exempt matter.

**44.** (1) Where there are proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document, section 37 of the *Administrative Appeals Tribunal Act* 1975 does not apply in relation to the document but if the Tribunal is not satisfied, by evidence on affidavit or otherwise—

- (a) that the document is an exempt document; and
- (b) in the case of a document that is an exempt document by virtue of a certificate of the Attorney-General under section 36, that the giving of the certificate was justified,

it may require the document to be produced for inspection by members of the Tribunal only and if, upon the inspection, the Tribunal is satisfied that the document is an exempt document and, in the case of a document referred to in paragraph (b), that the giving of the certificate was justified, the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person.

(2) The Tribunal may require the production, for inspection by members of the Tribunal only, of an exempt document for the purposes of determining whether it is practicable for an agency or a Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document and, where an exempt document is produced by reason of such a requirement, the Tribunal shall, after inspection of the document by the members of the Tribunal as constituted for the purposes of the proceeding, return the document to the person by whom it was produced without permitting any person other than such a member of the Tribunal, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person.

(3) Notwithstanding sub-sections (1) and (2) but subject to sub-section (4), the Tribunal is not empowered, in any proceedings, to require the production of a document in respect of which there is in force a certificate under section 23, 24 or 25.

(4) Where a certificate of a kind referred to in sub-section (3) identifies a part or parts of the document concerned in the manner provided in sub-section 23 (3), 24 (3) or 25 (3), sub-section (3) does not prevent the Tribunal from requiring the production, in proceedings before the Tribunal under this Act in relation to the document, of a copy of so much of the document as is not included in the part or parts so identified.

(5) Sub-sections (1) and (2) apply in relation to a document in the possession of a Minister that is claimed by the Minister not to be an official document of the Minister as if references in those sub-sections to an exempt document were references to a document in the possession of a Minister that is not an official document of the Minister.

(6) Sub-section (1) or (2) does not operate so as to prevent the Tribunal from causing a document produced in accordance with that sub-section to be sent to the Federal Court of Australia in accordance with section 46 of the *Administrative Appeals Tribunal Act* 1975, but, where such a document is so sent to the Court, the Court shall do all things necessary to ensure that the contents of the document are not disclosed (otherwise than in accordance with this Act) to any person other than a member of the Court as constituted for the purpose of the proceeding before the Court or a member of the staff of the Court in the course of the performance of his duties as a member of that staff.

45. In proceedings before the Tribunal under this Part, evidence of a certificate under section 23, 24 or 25, including evidence of the identity or nature of the document to which the certificate relates, may be given by affidavit or otherwise and such evidence is admissible without production of the certificate or of the document to which it relates.

48. (1) The Minister administering this Act shall, as soon as practicable after the end of each year ending on 31 December, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.

(2) Each agency shall, in relation to the agency, and each Minister shall, in relation to his official documents, furnish to the Minister administering this Act such information as he requires for the purposes of the preparation of reports under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.

EXCERPTS FROM THE REPORT OF THE AUSTRALIAN SENATE STANDING COMMITTEE ON THE FREEDOM OF INFORMATION BILL 1978

As we described in Chapter 6 of this report, the Australian Freedom of Information Bill 1978 was referred to the Senate Standing Committee on Constitutional and Legal Affairs for inquiry and report. The Committee made the following recommendations with respect to those clauses of the 1978 bill that are reproduced in the previous section of this appendix.

**Directories, indexes and manuals**

4. The list of matters required to be published under clause 6 (1) (a) should be rewritten to encompass, among other things:
  - (a) all possible institutional avenues presently existing (and which it is practicable to identify) for direct and indirect public participation in governmental decision making;
  - (b) facilities provided for physical access to agency information;
  - (c) informational literature available by way of subscription services or free mailing lists; and
  - (d) basic information about Freedom of Information legislation access procedures, including initial contact points for each agency.
5. The matters to be considered by the minister under clause 6 (2) in approving the form in which information about agencies and their documents is to be published should be widened to include what is necessary to enable members of the public:
  - (a) to take advantage of existing avenues for participation in governmental policy formulation and decision making;
  - (b) to avail themselves of agency facilities and information resources; and
  - (c) to exercise effectively the rights conferred under the Freedom of Information legislation as a whole.
6. The categories of 'internal law' documents described in clause 7 (1), and required (subject to exemptions) to be published, should be extended so as to clearly encompass:
  - (a) letters of advice (of precedential status) to persons outside the agency;
  - (b) statements of policy; and
  - (c) documents used in enforcing the law (as distinct from administering it).
7. Clause 7 (2) should be amended to require the publication, where necessary, of an index-updating statement at not less than three-monthly intervals rather than twelve-monthly as presently provided.

**Security, defence and international relations**

42. The criteria of prejudice to the security, defence or international relations of the Commonwealth employed in the Bill should be brought into line with the language of the *Protective Security Handbook*.

43. (a) The national security classification 'Restricted' should be discarded as serving no useful purpose in alerting officers to the danger of disclosure.
- (b) Cabinet documents should be distinctively marked but should not carry national security classifications unless such classifications are justified by their content.
44. *The Protective Security Handbook* should be re-written to specify that a classification marking will indicate the portion of the document (if not all) to which it applies.
45. A system for automatic declassification of national security documents should be instituted on an administrative basis.
46. The following details should be shown on the face of all documents given a national security classification:
- (a) the identity of the person who originally classified the document;
  - (b) the office in which the document originated; and
  - (c) the date at which declassification becomes effective or subsequent review must occur.
47. Clause 23 (1) should be amended by deleting the redundant reference to public interest.
48. Paragraph 23 (1) (b), which exempts any information or matter communicated confidentially by another government to the Australian Government, should be deleted.
49. (a) Clauses 23 (2)–(6) and 37 (5) should be deleted so that an applicant denied access to a document pursuant to clause 23 will be permitted to appeal to the Administrative Appeals Tribunal.
- (b) Such an appeal should be heard by a presidential member of the Tribunal.

#### **Commonwealth–State relations**

50. The Bill should be amended to include a separate test of public interest in determining whether documents relating to Commonwealth–State relations should be exempt and to permit appeals on this exemption to the Administrative Appeals Tribunal.

#### **Cabinet and Executive Council documents**

51. Clauses 24 and 25 should be amended to limit the scope of the conclusive exemption for Cabinet documents to documents containing opinion, advice or recommendations of a policy nature, thereby excluding documents of a purely factual nature such as consultants' reports, reports from advisory committees and so on.
52. (a) There should be a right of appeal to the Administrative Appeals Tribunal under clauses 24 and 25 on the limited question whether a document is in fact a Cabinet or Executive Council document; and
- (b) The jurisdiction to hear such an appeal against a determination under clause 24 or 25 that a document is a Cabinet or Executive Council document should be exercised by a presidential (legally qualified) member of the Tribunal acting alone.
53. (a) A special marking should be established to distinguish Cabinet documents and their attachments; and

- (b) The special 'Cabinet' marking should be used on attachment to Cabinet documents only where those attachments would be exempt from disclosure under clause 24 of the Bill.

#### **Internal working documents**

54. (a) Sub-clause 26 (1) should be left unchanged.  
(b) The wording of clause 26 (3) should be clarified so as to provide that clause 26 does not apply to documents, or portion thereof containing purely factual material.
55. Clause 37 (4) of the Bill should be deleted, in order that the powers of the Administrative Appeals Tribunal extend to reviewing a decision of an agency or minister that the disclosure of a document would be contrary to the public interest.

#### **Law enforcement documents**

56. The word 'lawful' should be inserted in clause 27 (d) between the words 'disclose' and 'methods' so as to provide for the exemption of lawful methods or procedures of law enforcement only.
57. Clause 27 should be amended to permit an agency to deny access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case.

#### **Prescribed secrecy provisions**

58. (a) Clause 28 should be amended so that the list of secrecy provisions to be prescribed under the clause be contained in a schedule to the Bill;  
(b) Any amendments to the schedule after enactment of the legislation should be made by regulation expressed to take effect only upon affirmative resolution of both Houses of the Parliament;  
(c) All criminal provisions prohibiting or restricting the disclosure of information that are not prescribed under the Bill should be repealed; and  
(d) Where possible, other provisions which confer power upon a tribunal, body or person to regulate the disclosure of information should be brought into line with the criteria contained in the exemptions in the Bill.
59. Urgent consideration should be given by the Government to the question of reforming section 70 of the Crimes Act so as to limit the categories of information that it is an offence to disclose and to establish procedural safeguards for any person who may face prosecution under that section. Any such reform of section 70 should preferably be enacted either before or simultaneously with the enactment of the Freedom of Information Bill.

#### **Adverse effect on agency operations**

60. The words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency' should be deleted from clause 29.
61. The 'staff management interests' referred to in clause 29 should be expressed as 'personnel management and assessment interests' in order to accommodate a wider range of matters legitimately entitled to protection.
62. A separate public interest criterion should be added to clause 29 to enable the review on public interest grounds of exemptions claimed under this clause.

### **Privilege and contempt**

63. (a) Sub-clause 31 (1) should be deleted as redundant; and  
(b) Sub-clause 31 (2) should be amended to read 'A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which the Commonwealth or an agency is or may be a party, on the ground of legal professional privilege'.
64. Clause 36 should be deleted on the grounds that it is redundant and contrary to the principle of the Bill.

### **Privacy**

65. The privacy exemption in clause 30 should be retained in its present form but it should be given particular attention when the legislation is subject to its first major review.

66. The Bill should be amended to incorporate a system whereby rights are conferred upon Australian citizens and permanent residents to request the correction of inaccurate or misleading facts concerning personal information pertaining to the applicant.

### **Commercially sensitive and other confidential information**

67. Clause 34 of the Bill, exempting documents the disclosure of which would constitute a breach of confidence, should be deleted

68. The Bill should be amended to include provision for:

- (a) notification by an agency to the supplier of documents which come within the terms of clause 32 that the agency has received a request for access to those documents and seeks the supplier's view as to whether disclosure should occur;
- (b) further notification to the supplier where the agency after consultation has decided to go ahead with disclosure; and
- (c) a recognised right of Reverse-FOI by means of an appeal to the Administrative Appeals Tribunal by the supplier against intended disclosure.

### **National economy**

69. Clause 33 of the Bill, exempting documents the disclosure of which would be contrary to the public interest by reason that they would be reasonably likely to have a substantial adverse effect on the national economy, should be deleted.

### **Internal review**

70. The notice required to be supplied to the applicant under clause 22 should include particulars of the manner in which application for internal review should be made.

71. Agencies should give consideration to the most appropriate internal review machinery for their own needs and take steps to ensure that such machinery is fully operational by the time of proclamation of the Act.

72. For the purposes of freedom of information the Ombudsman should make it a practice not to investigate a complaint before the completion of internal review unless he is of the opinion, taking account of the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time.

## **Role of the Ombudsman**

**73.** For the purposes of the Freedom of Information Bill, the Ombudsman should not be precluded in any way by section 6(3) of the Ombudsman Act or otherwise from investigating a matter which is also subject to review by the Administrative Appeals Tribunal.

**74.** In relation to clauses 23, 24 and 25 of the Bill the Ombudsman's powers should include those of investigation and conciliation insofar as he is able, but not include (except in the case of Commonwealth-State relations matters) the power to inspect the documents for which exemption is claimed.

**75.** For the purposes of freedom of information, ministerial decisions should be within the jurisdiction of the Ombudsman.

**76.** For the purposes of freedom of information the Ombudsman should be empowered to act as counsel before the Administrative Appeals Tribunal on behalf of an applicant if he forms the opinion that his intervention is warranted. In forming his opinion he should take account of such considerations as:

- (a) the importance of the principle involved in the matter;
- (b) the precedential value of the case;
- (c) the financial means of the complainant;
- (d) the complainant's prospects of success; and
- (e) the reasonableness of the agency's action in withholding the information.

**77.** The Ombudsman's powers in Reverse-FOI cases, in relation to people seeking to prevent the release of information which they have submitted to government, should include the power of investigation and conciliation but not include the power to act as counsel before the Administrative Appeals Tribunal on their behalf.

**78.** The Ombudsman should be empowered to advise agencies, at their request, concerning their obligations under the Freedom of Information Act and, in his reports to Parliament, to offer suggestions for improvement and reform in relation to freedom of information in general.

**79.** The relevant powers and duties should be vested in the Commonwealth Ombudsman for delegation to a Deputy Ombudsman appointed for freedom of information purposes.

## **Proceedings before the Administrative Appeals Tribunal**

**80.** For the purposes of freedom of information, the time within which an application for review must be made to the Administrative Appeals Tribunal should be extended from twenty-eight days to sixty days commencing on the day on which notice in writing of the decision is furnished to the applicant.

**81.** Where an applicant, having pursued his right of review through the Ombudsman, proceeds for review before the Administrative Appeals Tribunal without representation by the Ombudsman, and he substantially prevails in his case, the Tribunal should be empowered, in its discretion, to recommend to the Attorney-General that costs be awarded in the applicant's favour.

**82.** In deciding whether to exercise its discretion to recommend an award of costs, the matters to which the Administrative Appeals Tribunal is to have regard should include:

- (a) the public benefit;
- (b) the possible commercial benefit to the applicant; and
- (c) the reasonableness of the agency's action in withholding the document or (in the case of a Reverse-FOI action) deciding to release it.

**83.** In relation to appeals under clauses 23 (relating to security, defence, or international relations) 24 and 25 (relating to Cabinet and Executive Council documents) and 27 (relating to law enforcement documents) the Administrative Appeals Tribunal should be empowered, if it regards it as appropriate to do so, to announce its findings in terms which neither confirm nor deny the existence of the document in question.

#### **Administrative monitoring**

**84.** In order to facilitate the administrative monitoring of the Freedom of Information legislation and to provide a basis for agency reports to Parliament, agencies should, in consultation with the Attorney-General's Department and the Public Service Board, assemble in common form information relating to the following matters:

- (a) requests made;
- (b) the handling of rejections;
- (c) the costs of freedom of information;
- (d) internal procedures; and
- (e) staff training and development.

**85.** The Attorney-General's Department should be provided with sufficient resources to enable it to undertake its responsibilities in implementing the legislation and monitoring its operation.

**86.** The Department of the Prime Minister and Cabinet should in its annual report to Parliament, report not only upon its internal implementation of the Freedom of Information Act, but also upon its advisory role as to the Act's implementation in relation to other agencies.

**87.** The Public Service Board should continue to develop special monitoring processes which will make possible an assessment of any additional workloads generated as a result of the implementation of the legislation.

#### **Parliamentary monitoring**

**88.** Agencies should include in their annual reports to Parliament sufficient information concerning their operations in relation to freedom of information as will enable adequate parliamentary review.

**89.** Clause 48 of the Freedom of Information Bill should be extended to expressly state the matters on which the Attorney-General, as Minister responsible for administration of the legislation, should report to Parliament. These should include:

- (a) the number of requests for the year per agency;
- (b) the number of refusals;
- (c) the number of deferments;
- (d) exemptions claimed under the legislation;
- (e) the secrecy provisions invoked under clause 28;
- (f) the level of persons refusing access;

- (g) information on appeals activities;
- (h) administrative manhours, costs and fees collected in relation to freedom of information requests;
- (i) average time for compliance;
- (j) extra staff positions sought and/or approved;
- (k) changes in administrative procedures occasioned by freedom of information;
- (l) guidelines issued by the Attorney-General's Department; and
- (m) a description of efforts by the Department to encourage compliance with the legislation.

90. The Attorney-General's first report to Parliament should contain an extensive account of agencies' compliance with the publication requirements of clauses 6 and 7. Subsequent reports should detail agencies' efforts to update the information published or made available under clauses 6 and 7.

91. Clause 48 (1) should be amended to require the minister administering the Freedom of Information Bill to report to Parliament as soon as practicable after the end of each year ending on 30 June and in any case no later than 31 October.

92. The Ombudsman should report to Parliament on the operations of his office in relation to freedom of information as part of his annual report to Parliament and by way of special reports to Parliament concerning freedom of information as required.

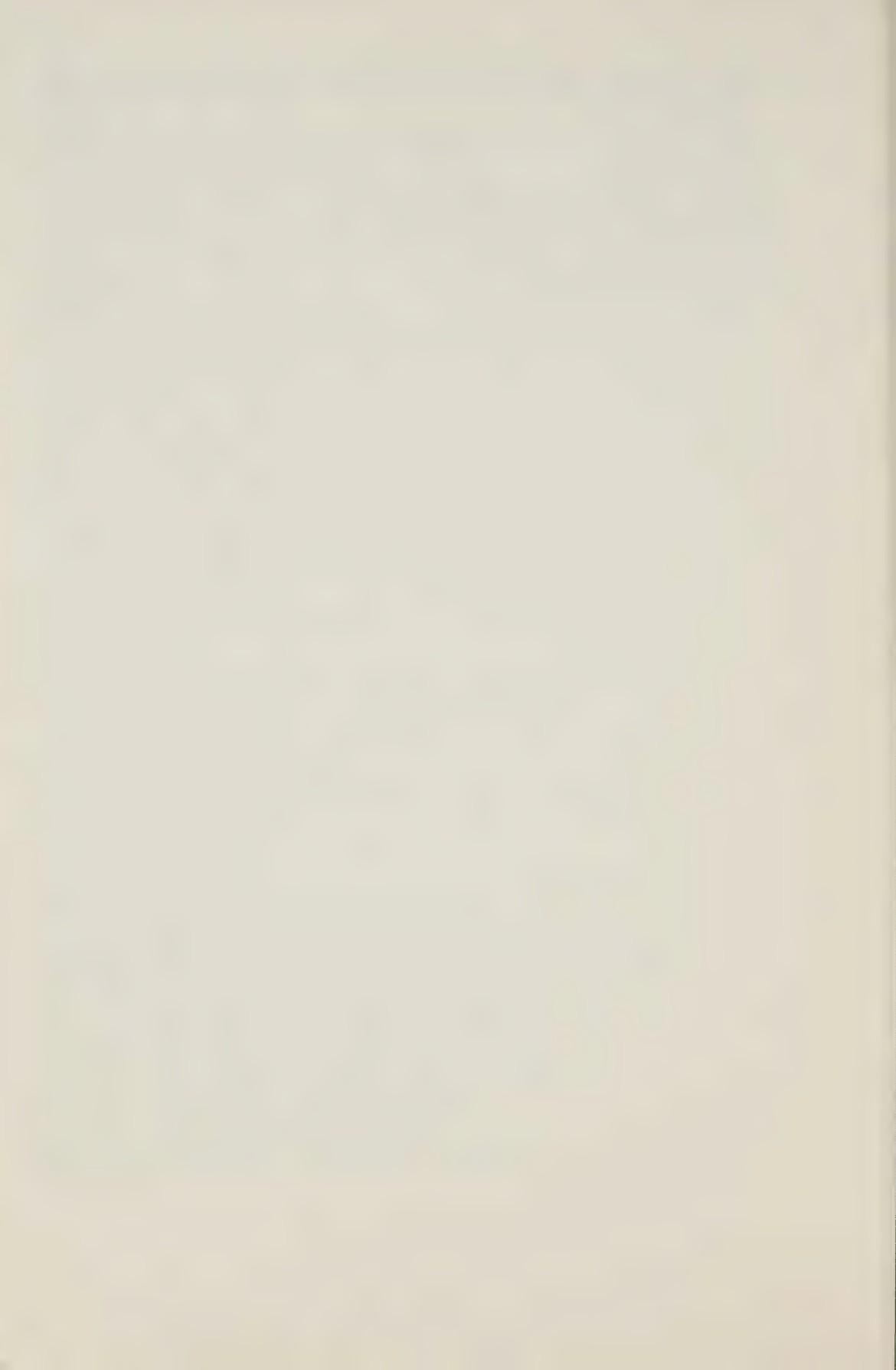
93. The operation of the Freedom of Information legislation should be subject to review by the Senate Standing Committee on Constitutional and Legal Affairs three years after the first proclamation of the legislation.

D. ONTARIO STATUTES CONTAINING SECRECY PROVISIONS

Ambulance Act  
Assessment Act  
Audit Act, 1977  
Bailiffs Act  
Building Code Act, 1974  
Business Practices Act, 1974  
Cancer Act  
Cancer Remedies Act  
Child Welfare Act  
Collection Agencies Act  
Colleges Collective Bargaining Act, 1975  
Commodity Futures Act, 1978  
Compensation for Victims of Crime Act, 1971  
Consumer Protection Act  
Consumer Reporting Act, 1973  
Co-operative Corporations Act, 1973  
Corporations Information Act, 1976  
Corporations Tax Act, 1972  
County of Oxford Act, 1974  
Crown Employees Collective Bargaining Act, 1972  
Denture Therapists Act, 1974  
Deposits Regulation Act  
District Municipality of Muskoka Act  
Education Act, 1974  
Election Act  
Employment Standards Act, 1974  
Energy Act, 1971  
Environmental Assessment Act, 1975  
Environmental Protection Act, 1971  
Expropriations Act  
Funeral Services Act, 1976  
Gasoline Tax Act, 1973  
Health Disciplines Act, 1974  
Health Insurance Act, 1972  
Human Tissue Gift Act, 1971  
Income Tax Act  
Insurance Act  
Judicature Act  
Juries Act, 1974  
Labour Relations Act  
Law Society Act  
Legal Aid Act  
Legislative Assembly Act  
Liquor Licence Act, 1975

Mental Health Act  
Mining Act  
Mining Tax Act, 1972  
Ministry of Correctional Services Act, 1978  
Ministry of Health Act, 1972  
Ministry of Treasury and Economics Act, 1978  
Mortgage Brokers Act  
Motor Vehicle Dealers Act  
Motor Vehicle Fuel Tax Act  
Municipal Act  
Municipal Elections Act, 1972  
North Pickering Development Corporation Act, 1974  
Occupational Health and Safety Act, 1978  
Ombudsman Act, 1975  
Ontario Economic Council Act  
Ontario Energy Board Act  
Ontario Guaranteed Annual Income Act, 1974  
Ontario Highway Transport Board Act  
Ontario Land Corporation Act, 1974  
Ontario Municipal Board Act  
Ontario Youth Employment Act, 1977  
Paperback and Periodical Distributors Act, 1971  
Pesticides Act, 1973  
Petroleum Resources Act, 1971  
Planning Act  
Police Act  
Private Investigators and Security Guards Act  
Private Sanitaria Act  
Proceedings Against the Crown Act  
Professional Engineers Act  
Public Commercial Vehicles Act  
Public Service Act  
Public Trustee Act  
Public Vehicles Act  
Race Tracks Tax Act  
Real Estate and Business Brokers Act  
Regional Municipality of Durham Act, 1973  
Regional Municipality of Haldimand-Norfolk Act, 1973  
Regional Municipality of Halton Act, 1973  
Regional Municipality of Hamilton-Wentworth Act, 1973  
Regional Municipality of Peel Act, 1973  
Regional Municipality of Sudbury Act, 1972  
Regional Municipality of Waterloo Act, 1972  
Regional Municipality of Niagara Act  
Regional Municipality of York Act  
Regional Municipality of Ottawa-Carleton Act  
Retail Sales Tax Act

School Boards and Teachers Collective Negotiations Act, 1975  
Securities Act, 1978  
Statistics Act  
Telephone Act  
Tobacco Tax Act  
Travel Industry Act, 1974  
Upholstered and Stuffed Articles Act  
Venereal Diseases Prevention Act  
Vital Statistics Act  
Workmen's Compensation Act









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